

**Unravelling the process of defining war rape and  
forced marriage in times of armed conflict under  
the statute of the International Criminal Court:  
Actors and structures**

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This thesis is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

July 2015

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Word Count of thesis: 97,920

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Full title of thesis  
UNRAVELLING THE PROCESS OF DEFINING WAR RAPE AND FORCED MARRIAGE  
IN TIMES OF ARMED CONFLICT UNDER THE STATUTE OF THE INTERNATIONAL  
CRIMINAL COURT: ACTORS AND STRUCTURES

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### Summary:

The International Criminal Court's (ICC) provisions on sexualised violence are praised as progressive. However, they exclude forced marriage in times of armed conflict, interpreting it as a form of sexual slavery. Furthermore, the ICC rape definition can be interpreted as regressive and awkward.

Puzzled by these contradictions, this thesis analyses the process of defining war rape and forced marriage. It focuses on the key actors, their influences, their understandings of war rape and forced marriage, and on how they shaped the definition process. The thesis argues that state and non-state actors drove the ICC negotiations of the two crimes. Their understanding of war rape and forced marriage was influenced by international, national and personal normative structures. Key actors shaped the definition process through research and policy analysis, producing reports and proposals, lobbying, and through serving on state delegations.

The thesis stresses that International Law is made by women and men, not by abstract entities. It draws attention to (dis)continuities in international law-making, highlighting developments from a state-centric towards a more inclusive process. Moreover, the priority of international over national and personal normative structures is challenged. Appreciating how the actors in the ICC negotiations reached their understanding of war rape and forced marriage is crucial to understand their positions that shaped the definitions of the two crimes. Understanding how actors influenced the ICC negotiations is an important starting point for reflection on the effectiveness of these methods.

The aim and potential contribution of this thesis is to deepen the understanding of the ICC negotiations of war rape and forced marriage. By analysing forced marriage in this context, it aims to raise awareness of the crime and hence to contribute towards a better understanding of it. The thesis also highlights relevant factors that need considering when criminalising sexualised war violence under International Law.

## **Acknowledgments**

Thank you very much:

Aberystwyth University, Christine Chinkin, Chris Harding, the interviewees, Bianca Maier, Anèl Marais, Ryszard Piotrowicz, Marcel van der Stroom, Janna Wolff



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United States of America v Ulrich Greifelt and others (07 July 1947 - 10 March 1948) “RuSHA case”

United States of America v Pohl and others (13 January 1947 - 11 August 1948) “Pohl/WVHA case”

### **List of abbreviations**

African Charter on Human Rights and Peoples' Rights (Banjul Charter)

Armed Forces Revolutionary Council (AFRC)

Charter of the International Military Tribunal (London Agreement)

Coalition for the International Criminal Court (CICC)

Convention Concerning Forced or Compulsory Labour (Forced Labour Convention)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Convention on the Prevention and Punishment of the Crime of (Genocide Convention)

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Convention to Suppress the Slave Trade and Slavery (Slavery Convention)

Declaration on the Elimination of Violence against Women (DEVAW)

Fourth World Conference on Women (Beijing Conference)

Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (Lieber Code)

Like-Minded Group (LMG)

International Committee of the Red Cross (ICRC)

International Conference on Population and Development (Cairo Conference)

International Court of Justice (ICJ)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Criminal Court (ICC)

International Criminal Tribunal for the former Yugoslavia (ICTY)

International Criminal Tribunal for Rwanda (ICTR)

International Law Commission (ILC)

International Military Tribunal (IMT, Nuremberg Tribunal)

International Military Tribunal for the Far East (IMTFE, Tokyo Tribunal)

Lord's Resistance Army (LRA)

Non-Aligned Movement (NAM)

non-governmental organisation (NGO)

Preparatory Committee on the Establishment of an International Criminal Court (PrepCom)

Preparatory Commission for the International Criminal Court (PrepCom2)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)

Revolutionary United Front (RUF)

Special Court for Sierra Leone (SCSL)

Southern African Development Community (SADC)

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention)

Truth and Reconciliation Commission (TRC)

United Kingdom of Great Britain and Northern Ireland (UK)

United Nations (UN)

United Nations General Assembly (UNGA)

United Nations Security Council (UNSC)

United States of America (USA, US)

Universal Declaration of Human Rights (UDHR)

World Conference on Human Rights (Vienna Conference)

# **1 Introduction**

## *1.1 Introduction*

This thesis analyses the international criminalisation of war rape and forced marriage in times of armed conflict under the statute of the International Criminal Court (ICC). It addresses the ongoing challenge of how to define the two crimes in a way that adequately reflects women's experiences, as well as the nature of the crimes.

The ICC definition of war rape is considered one of the most progressive<sup>1</sup> and broad definitions of rape under international and national law.<sup>2</sup> This, however, overlooks the awkward, limiting and partly regressive wording<sup>3</sup> of the first element, defining rape as an invasion resulting in penetration.<sup>4</sup> This formulation is puzzling considering that actors in the ICC negotiations could have relied on a more progressive precedent in defining rape. Contrastingly, the crime of forced marriage was understood as a form of sexual slavery and was not discussed in any depth.<sup>5</sup> This neglect is perplexing considering the widespread use of forced marriage in conflicts that were ongoing while the ICC instruments were negotiated<sup>6</sup> and would likely be considered by the court.<sup>7</sup>

Based on this critique of the ICC's definition of war rape and forced marriage, the thesis analyses the process of how those definitions came about. Using a feminist and

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<sup>1</sup> For the purpose of this thesis, progressive definitions of war rape and forced marriage are understood to adequately reflect women's experiences as well as the nature of the crimes.

<sup>2</sup> Interview 13 (15 May 2014).

<sup>3</sup> Christopher Keith Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (2000) 94 *American Journal of International Law* 773, 778; Human Rights Watch, 'Commentary on the Second Preparatory Commission on Rules of Procedure and Elements of Crime' (July 1999) <<http://www.iccnw.org/documents/HRWComment2ndPrepComJuly99.pdf>> accessed 09 February 2012; United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (22 June 1998) UN Doc E/CN.4/Sub.2/1998/13.

<sup>4</sup> Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3 art 7(1)(g), art 8(b)(xxii), art 8(e)(vi).

<sup>5</sup> Interview 17 (17 June 2014); Interview 18 (25 June 2014).

<sup>6</sup> Khristopher Carlson and Dyan Mazurana, 'Forced Marriage within the Lord's Resistance Army, Uganda' (2008) Tufts University Feinstein International Center <<https://wikis.uit.tufts.edu/confluence/download/attachments/14553676/Forced+Marriage+within+the+LRA.pdf?version=1>> accessed 08 July 2013; Women Under Siege, 'Liberia' <<http://www.womenundersiegeproject.org/conflicts/profile/Liberia>> accessed 23 January 2015; Women Under Siege, 'Sierra Leone' <<http://www.womenundersiegeproject.org/conflicts/profile/sierra-leone>> accessed 23 January 2015.

<sup>7</sup> International Criminal Court, 'Situations and Cases: Uganda' <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx)> 23 January 2015.

constructivist lens, it focuses on the driving actors, what influenced them, how they understood the crimes of war rape and forced marriage, and how they shaped the ICC negotiations. It is argued that, in addition to state delegations, non-governmental organisations (NGOs) in general and women's organisations in particular played a role in developing the definitions of war rape and forced marriage. Actors represented all parts of the world and included survivors of sexualised war violence.<sup>8</sup> Opposition to progressive definitions of rape and forced marriage came mainly from states with strong patriarchal structures where religion plays a leading role in legal and social matters. Influenced by national and international norms, rape and forced marriage were interpreted as honour crimes as well as acts of structural violence. Actors shaped the ICC definitions of the two crimes by conducting research and policy analysis, producing and distributing reports and proposals, organising briefings, and lobbying. Non-state actors also influenced the negotiations as civil society members of state delegations.

The aim and potential contribution of this thesis is to deepen the understanding of the ICC negotiations of war rape and forced marriage. By comparing the criminalisation of war rape and forced marriage, this thesis highlights relevant factors that need to be considered when criminalising acts of sexualised war violence under International Law. By considering forced marriage in the context of the ICC negotiations, the thesis also aims at raising awareness of the crime and intends to contribute towards a better understanding of it.

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<sup>8</sup> Susan Brownmiller, 'Making Female Bodies the Battlefield' in Ronald J Berger and Patricia Searles (eds), *Rape and Society: Readings on the Problem of Sexual Assault* (Westview Press 1995); Slavenka Drakulić, 'The Rape of Women in Bosnia' in Miranda Davies (ed), *Women and Violence: Realities and Responses World Wide* (Zed Books 1994) 180; Christine Eifler, 'Krieg – Gewalt – Geschlecht' in medica mondiale, Marlies W Fröse and Ina Volpp-Teuscher (eds), *Krieg, Geschlecht und Traumatisierung: Erfahrungen und Reflexionen in der Arbeit mit traumatisierten Frauen in Kriegs- und Krisengebieten* (IKO-Verlag für Interkulturelle Kommunikation 1999) 91; Joshua S Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa* (Cambridge University Press 2001) 359; Gabriela Mischkowski, 'Sexualisierte Gewalt im Krieg: Eine Chronik' in medica mondiale and Karin Griesse (eds), *Sexualisierte Kriegsgewalt und ihre Folgen: Handbuch zur Unterstützung traumatisierter Frauen in verschiedenen Arbeitsfeldern* (2<sup>nd</sup> edn, Mabuse-Verlag 2006); Ruth Seifert, 'Krieg und Vergewaltigung: Ansätze zu einer Analyse' in Alexandra Stiglmayer (ed), *Massenvergewaltigungen: Krieg gegen die Frauen* (Fischer Taschenbuchverlag 1993) 88: This thesis uses the term 'sexualised' rather than 'sexual' violence. The term 'sexual' violence emphasises sexuality in the context of violence and can lead to a confusion of sexuality, and violence using sexual means. 'Sexualised' violence, in contrast, highlights the act of violence itself. It describes a form of violence which is deliberately directed against the most intimate part of a person's body. An act of sexualised violence demonstrates power and domination by debasing, subordinating and humiliating another person. The term 'sexualised' violence is broader than 'sexual' violence. It includes rape but also acts such as forced undressing, touching without permission, forced shaving of pubic hair, inflicting deliberate harm to breasts and genitals, purposefully infecting someone with sexually transmitted diseases, and forced pregnancy. Sexualised violence includes gender-based violence. Therefore, in this thesis, the term 'sexualised' violence is used.

## 1.2 Context

### 1.2.1 Legislative histories of war rape and forced marriage

From ancient to modern times, sexualised war violence against women was viewed as a socially acceptable practice in war, as collateral damage. Women were spoils of war, a reward to which the victors had a right. Sexualised violence was tolerated, if not encouraged, as a means of propaganda, humiliation and terror.<sup>9</sup> The criminalisation of sexualised war violence has been attempted at the international level at least since the 18<sup>th</sup> century when bilateral and multilateral conventions criminalised sexualised war violence in the form of rape as an honour crime. This understanding was maintained in international agreements of the early and mid-20<sup>th</sup> century as well as by the Nuremberg and Tokyo tribunals established after the Second World War. International instruments of the second half of the 20<sup>th</sup> century moved away from an honour-based interpretation of sexualised war violence towards an understanding of it as a gender-based violation of women's integrity. Sexualised war violence was framed as an issue of discrimination against as well as of protecting women and their fundamental rights. A connection was established between the vulnerability of women in wartime and the discrimination and disadvantages they experience in everyday life. Despite this growing recognition of sexualised war violence as a wrong, acts of sexualised war violence were perpetrated publicly and systematically on a massive scale during the conflicts in the former Yugoslavia and Rwanda in the 1990s. War rape was used as a strategic method to destroy culture and life as well as a method of ethnic cleansing and genocide. This was a known fact, condoned, encouraged and even ordered.<sup>10</sup> In response, the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) explicitly included war rape as a crime against humanity. The ICTR statute also explicitly listed rape as an outrage upon personal dignity which constitutes a violation of Article 3 common to the Geneva Conventions and to Additional Protocol II.<sup>11</sup> In the tribunals' jurisprudence,

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<sup>9</sup> Anne-Marie LM de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intertec 2005); Mischkowski, 'Sexualisierte Gewalt im Krieg' (n 8); Seifert (n 8).

<sup>10</sup> African Rights, *Rwanda: Death, Despair and Defiance* (2<sup>nd</sup> edn, African Rights 1995); Brouwer (n 9); Christine Chinkin, 'Violence Against Women: The International Legal Response' (1995) 3 (2) *Gender and Development* 23; Goldstein (n 8) 563; Diane Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing 2005); Alexandra Stiglmayer (ed), *Massenvergewaltigungen: Krieg gegen die Frauen* (Fischer Taschenbuchverlag 1993).

<sup>11</sup> UNSC Resolution 827 (25 May 1993) UN Doc S/RES/827; UNSC Resolution 955 (08 November 1994) UN Doc S/RES/955.

war rape was defined as a crime against humanity,<sup>12</sup> a war crime,<sup>13</sup> as constituting torture,<sup>14</sup> an act of genocide<sup>15</sup> and a grave breach of the Geneva Conventions.<sup>16</sup> Before the ICC negotiations had been completed, the Yugoslavia and Rwanda tribunals developed different definitions of the crime of rape as such. In *Prosecutor v Jean-Paul Akayesu*, the ICTR introduced a definition using the term ‘invasion’.<sup>17</sup> The term ‘penetration’ was used in definitions developed in *Prosecutor v Anto Furundžija*<sup>18</sup> and in *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Foča case)*.<sup>19</sup> The latter can also be found in most national definitions.<sup>20</sup>

<sup>12</sup> *Prosecutor v Jean-Paul Akayesu* (Amended Indictment) ICTR-96-4-I (16 February 1996) Count 13; *Prosecutor v Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T (02 September 1998); *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Indictment) IT-96-23-T “Foča case” (19 June 1996) para 4.8.

<sup>13</sup> *Foča Indictment* (n 12) para 4.8; *Prosecutor v Anto Furundžija* (Trial Judgment) ICTY IT-95-17/1-T (10 December 1998) section IX.

<sup>14</sup> *Foča Indictment* (n 12) para 4.8.

<sup>15</sup> *Akayesu Trial Judgment* (n 12) para 507-508.

<sup>16</sup> *Foča Indictment* (n 12) para 4.8 and counts 56-59.

<sup>17</sup> *Akayesu Trial Judgment* (n 12) para 598.

<sup>18</sup> *Furundžija Trial Judgment* (n 13) para 185.

<sup>19</sup> *Foča Indictment* (n 12) para 4.8; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Trial Judgment) ICTY IT-96-23-T and IT-96-23/1-T “Foča case” (22 February 2001) para 460.

<sup>20</sup> For example see Bahrain Penal Code (1976) art 344, art 346 <<http://www.bahrainrights.org/sites/default/files/Bahrain-Penal-Code.doc>> accessed 17 March 2014; The Criminal Act of 1991 (Sudan) art 149(1) <<http://www.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/B9EEBA1CA8F54121C1256DC9005573F2/TEXT/Criminal%20Act%20-%20Sudan%20-%20EN.pdf>> accessed 01 April 2014; Iraqi Penal Code No. 111 (1969) art 21(1)(f), art 393(1) <[http://www.iraq-lg-law.org/en/webfm\\_send/1350](http://www.iraq-lg-law.org/en/webfm_send/1350)> accessed 18 March 2014; Ley No 599 de 2000 Por la cual se expide el Código Penal (24 July 2000) (Colombia) art 205 <<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6388>> accessed 08 May 2015; The Libyan Penal Code (1953) art 407 <<https://ia600704.us.archive.org/25/items/LibyanPenalCodeenglish/LibyanPenalCode.pdf>> accessed 24 March 2014; Omani Penal Code (1974) art 218(1) <<http://www.fiu.gov.om/forms.html>> accessed 24 March 2014; Qatari Penal Code (2004) art 279 <<http://portal.www.gov.qa/wps/wcm/connect/8abaea8046be1deaae97ef70b3652ad8/Penal+Code.pdf?MOD=AJPERES&useDefaultText=0&useDefaultDesc=0>> accessed 24 March 2014; Federal Bureau of Investigation, ‘Frequently Asked Questions about the Change in the UCR Definition of Rape’ (11 December 2014) <<http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/new-rape-definition-frequently-asked-questions>> accessed 19 January 2015; Mona Chemali Khalaf, ‘Lebanon’ in Julia Breslin and Sanja Kelly (eds), *Women’s Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/Rowman & Littlefield Publishers 2010) 6 <[http://www.freedomhouse.org/sites/default/files/inline\\_images/Lebanon.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Lebanon.pdf)> accessed 21 March 2014; U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, ‘2009 Human Rights Report: Saudi Arabia’ (2010) <<http://www.state.gov/j/drl/rls/hrrpt/2009/nea/136079.htm>> accessed 01 April 2014; U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, ‘2009 Human Rights Report: Syria’ (2010) <<http://www.state.gov/j/drl/rls/hrrpt/2009/nea/136080.htm>> accessed 01 April 2014.

While the *ad hoc* tribunals largely focused on war rape, some, especially women's rights advocates, began to criticise the overemphasis on war rape in the discussion of sexualised war violence. They stressed that women also experience other acts and forms of violence in wartime. The United Nations (UN) Special Rapporteur on Violence against Women, its Causes and Consequences, for example, directly mentioned forced marriage in times of armed conflict in her reports from 1995 on.<sup>21</sup> The first definition of forced marriage, however, was put forward by the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict. At a time when the ICC's Rome Statute had been passed and the discussion of the Elements of Crimes had begun, she found the constituting elements of forced marriage to include being forced into a conjugal relationship, forced labour and acts of sexualised violence.<sup>22</sup> After the ICC Elements of Crimes were passed, the Special Court for Sierra Leone (SCSL) addressed the issue as a form of sexual slavery and an inhumane act in *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (AFRC case),<sup>23</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (RUF case)<sup>24</sup> and *Prosecutor v Charles Taylor*.<sup>25</sup> In these cases, the Special Court also developed different ways of referring to the crime.

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<sup>21</sup> United Nations Commission on Human Rights 'Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45' (22 November 1994) UN Doc E/CN.4/1995/42 fn 228; United Nations Commission on Human Rights 'Report on the Mission of the Special Rapporteur to Poland on the Issue of Trafficking and Forced Prostitution of Women (24 May to 1 June 1996)' (10 December 1996) UN Doc E/CN.4/1997/47/Add.1 para 77-78, para 84; United Nations Commission on Human Rights 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44' (26 January 1998) UN Doc E/CN.4/1998/54 para 17, para 23, para 27, para 36.

<sup>22</sup> United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3) para 30.

<sup>23</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Appeals Chamber Judgment) SCSL SLS-2004-16-A "AFRC case" (22 February 2008); *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Trial Judgment) SCSL-04-16-T "AFRC Case" (20 June 2007).

The AFRC (Armed Forces Revolutionary Council) was a Sierra Leone fighting group that participated in the conflict in the 1990s and early 2000s. For further information see for example Davidson SHW Nicol, 'Sierra Leone' (13 May 2014) *Encyclopaedia Britannica* <<http://www.britannica.com/place/Sierra-Leone/Civil-war#ref978722>> accessed 02 July 2015.

<sup>24</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Trial Judgment) SCSL-04-15-PT "RUF Case" (02 March 2009).

The RUF (Revolutionary United Front) was a Sierra Leonean fighting group that participated in the conflict in the 1990s and early 2000s. For further information see for example Richard McHugh, 'RUF' (23 November 2015) *Encyclopaedia Britannica* <<http://www.britannica.com/topic/Revolutionary-United-Front>> accessed 20 February 2016.

<sup>25</sup> *Prosecutor v Charles Taylor* (Trial Judgment) SCSL-03-01-T (18 May 2012).



### 1.2.2 War rape, forced marriage and the ICC

The ICC,<sup>26</sup> based in The Hague in the Netherlands, is the first independent, permanent international criminal court established to try persons accused of the most serious crimes of international concern: genocide, crimes against humanity and war crimes.<sup>27</sup>

The ICC is a treaty-based court, governed by the Rome Statute that is binding only on those states which formally express their consent to be bound by its provisions. The Rome Statute was negotiated between 1994 and 1998.<sup>28</sup> A draft statute for an international criminal court was submitted to the United Nations General Assembly (UNGA) by the United Nations International Law Commission (ILC) in 1994. The ILC recommended

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<sup>26</sup> For more information on the ICC see for example Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002); Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001); Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999); William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2007); Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2<sup>nd</sup> edn, CH Beck 2008).

<sup>27</sup> International Criminal Court, 'About the Court' <[http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx)> accessed 28 January 2015; International Criminal Court, 'At a glance' <[http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx)> accessed 28 January 2015; International Criminal Court, 'Factsheet' <[http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/factsheets/Pages/fact%20sheets.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/factsheets/Pages/fact%20sheets.aspx)> accessed 28 January 2015.

<sup>28</sup> M Cherif Bassiouni, *The Legislative History of the International Criminal Court* (Transnational Publishers 2005) 31-34, 54-64; Fanny Benedetti, Karine Bonneau and John Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Brill 2013) 15-16; Cassese, Gaeta and Jones (n 26); Coalition for the International Criminal Court, 'History of the ICC' <<http://www.iccnw.org/?mod=icchistory>> accessed 03 December 2013; Lee, *The International Criminal Court: The Making of the Rome Statute* (n 26); Schabas (n 26): The history of the establishment of an international criminal court goes back further than 1994 though. Efforts to create a global criminal court can be traced back to the 19<sup>th</sup> century when Gustav Moynier proposed a permanent court in response to the crimes perpetrated in the context of the Franco-Prussian War. After the First World War, the drafters of the Treaty of Versailles envisaged an *ad hoc* international court to try the German Kaiser and other war criminals. International military tribunals were established by the Allies in Nuremberg and Tokyo after the Second World War to try Axis war criminals. Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide (09 December 1948) 78 UNTS 277 (Genocide Convention) calls for violations to be dealt with "by such international penal tribunals as may have jurisdiction". In the early 1950s, the International Law Commission (ILC) drafted a Code of Offences against the Peace and Security of Mankind (28 July 1954) 9 UN GAOR Supp. (No. 9) at 11, UN Doc A/2693 (1954), 45 AJIL 123 (1951). A United Nations (UN) Committee established by the United Nations General Assembly (UNGA) prepared two drafts of a statute for an international criminal court. Disagreement over the definition of the crime of aggression as well as the Cold War, however, got in the way of these efforts and the UNGA effectively abandoned the project without an agreement on how to define the crime of aggression and on an international Code of Crimes having been reached. Motivated partly by the desire to combat drug trafficking, Trinidad and Tobago revived a pre-existing proposal for the establishment of an international criminal court in June 1989. The UNGA asked the ILC to resume its work on drafting a statute. After the conflicts in the former Yugoslavia and Rwanda in the early 1990s, the United Nations Security Council (UNSC) established two *ad hoc* tribunals to hold individuals accountable for crimes committed during these conflicts.

convening a conference of plenipotentiaries to negotiate a treaty and enact the draft statute. The UNGA, however, decided to establish the Ad Hoc Committee on the Establishment of an International Criminal Court to “review the major substantive and administrative issues arising out of the draft statute prepared by the [ILC] and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.”<sup>29</sup> After meeting twice, the Ad Hoc Committee submitted its report to the UNGA in 1995. It proposed to “combine further discussions [of issues] with the drafting of texts, with a view to preparing a consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.”<sup>30</sup> After considering the report, the UNGA created the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) to prepare a consolidated draft text. Between March 1996 and April 1998, the PrepCom met six times at the UN headquarters in New York. In January 1998, the inter-sessional meeting in Zutphen, the Netherlands, took place to technically consolidate and restructure the draft articles into a draft statute. Based on the PrepCom’s draft, the UNGA convened the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) to finalise and adopt a convention on the establishment of an international criminal court. The Rome Conference took place from 15 June to 17 July 1998 in Rome, Italy. The Rome Statute was adopted on 17 July 1998 with 120 state delegations voting in favour, seven against and 21 states abstaining.<sup>31</sup> After the Rome Conference, the Preparatory Commission for the International Criminal Court (PrepCom2) was charged with completing the establishment and enabling smooth functioning of the ICC by negotiating complementary documents<sup>32</sup> setting out the court’s structure,

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<sup>29</sup> Ad Hoc Committee on the Establishment of an International Criminal Court ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ (06 September 1995) UN Doc A/50/22 para 255.

The Ad Hoc Committee discussed issues related to the establishment and composition of the ICC, the principle of complementarity, applicable law and jurisdiction of the court, exercise of jurisdiction, methods of proceedings, the relationship between states parties, non-states parties and the ICC as well as budget and administration.

<sup>30</sup> *ibid.*

<sup>31</sup> International Criminal Court, ‘About the Court’ (n 27): By 11 April 2002, the Rome Statute had been ratified by 60 states and entered into force on 1 July 2002.

<sup>32</sup> Those include the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Financial Regulations and the Agreement on the Privileges and Immunities of the Court. According to Article 9(1) of the Rome Statute, the Elements of Crimes “assist the Court in the interpretation and application of articles 6, 7 and 8.” Articles 6-8 cover genocide, crimes against humanity and war crimes respectively.

jurisdiction and functions. Of particular relevance to this thesis are the Elements of Crimes that were negotiated between February 1999 and July 2000.<sup>33</sup>

State and non-state delegations participated in the ICC negotiations. States were the main actors in the sense that they made the final decisions. They acted individually as well as in groups. NGOs attended the negotiations under the umbrella of the international NGO Coalition for the International Criminal Court (CICC). This facilitated networking and cooperation between NGOs at multiple levels, as well as between NGOs and states. NGOs closely monitored the discussions and produced and distributed information on developments. They also produced, distributed and promoted new research, expert documents and news articles. Additionally, they briefed and lobbied state delegations. This way, they facilitated exchange and provided input into the discussions. NGOs provided more detailed and specific contexts for the decisions that were to be made by states. However, members of NGOs also influenced states' decisions by becoming members of state delegations. Furthermore, NGOs had an impact on the ICC negotiations by undertaking preliminary drafting work. NGOs engaged in capacity building, provided orientation and guidance and mobilised other NGOs. NGOs also facilitated parallel activities, raising awareness of the ICC.<sup>34</sup>

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<sup>33</sup> Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 36; Benedetti, Bonneau and Washburn (n 28); Cassese, Gaeta and Jones (n 26); Coalition for the International Criminal Court, 'History of the ICC' (n 28); International Criminal Court, 'Establishment of the Court' <[http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/establishment%20of%20the%20court.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/establishment%20of%20the%20court.aspx)> accessed 28 January 2015; International Criminal Court, 'Factsheet' (n 27); Lee, *The International Criminal Court: The Making of the Rome Statute* (n 26); Schabas (n 26).

For more information about the negotiations to establish the ICC see for example publications by Christopher Keith Hall and Jennifer Schense; ICC Monitor; Terra Viva.

<sup>34</sup> Benedetti, Bonneau and Washburn (n 28) 1428; Cassese, Gaeta and Jones (n 26); Coalition for the International Criminal Court, 'History of the ICC' (n 28); Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (n 26); Schabas (n 26).

For more information on NGOs and the ICC negotiations see Fanny Benedetti and John L Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' (1999) 5 *Global Governance* 1; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007); Mark S Ellis, 'The Contribution of Non-Governmental Organizations to the Creation of International Criminal Tribunals' in Bartram S Brown (ed), *Research Handbook on International Criminal Law* (Edward Elgar Publishing 2011); Marlies Glasius, *The International Criminal Court: A Global Civil Society Initiative* (Routledge 2006); Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2009) 30 *Michigan Journal of International Law* 1; Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press 2005) 460-179; William R Pace and Jennifer Schense, 'Coalition for the International Criminal Court at the Preparatory Commission' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001); William R Pace and Jennifer Schense, 'The Role of Non-Governmental Organizations' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary, Volume 1* (Oxford University Press 2002); Zoe Pearson, 'Non-

The Rome Statute's provisions on sexualised violence are considered to be great achievements. They build on existing international laws, especially the experience and expertise of the ICTY and ICTR, and recognise rape as a war crime and a crime against humanity.<sup>35</sup> Going further than the *ad hoc* tribunals, the ICC Elements of Crimes also specify that rape can cause serious bodily or mental harm<sup>36</sup> and therefore constitute an act of genocide if the qualifying elements of genocide are met.<sup>37</sup> In addition to rape, the Rome Statute also explicitly recognises "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, [and] any other form of sexual violence of comparable gravity"<sup>38</sup> as well as gender-based persecution.<sup>39</sup>

Previous research on the evolution of the ICC and its instruments considered the process of including rape as a war crime and crime against humanity in the Rome Statute and the outcome of the process of defining the crime.<sup>40</sup> The final definition of war rape is

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Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) 39 Cornell International Law Journal 243.

It has to be stressed that NGO advocacy and activism in International Law is not a new phenomenon. For more information see for example Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 American Journal of International Law 348; Lindblom (n 34).

For more information about women's international advocacy and activism see for example Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486; Chinkin, 'Violence Against Women' (n 10); Martha Alter Chen, 'Engendering World Conferences: The International Women's Movement and the UN' (1995) 16 Third World Quarterly 477; Karen Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 American Journal of International Law 778; John Hagen, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press 2003); Halley, 'Rape at Rome' (n 34) 1; Julie Mertus, 'When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia' (2008) 38 Seton Hall Journal of Law 1297; Vahida Nainar and Pam Spees, 'The International Criminal Court: The Beijing Platform IN Action' (2000) <<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/resources/bplus5/bplus5index.htm>> accessed 30 May 2014; Otto, 'Disconcerting "Masculinities"' (n 10); Cynthia Rothschild, *Written Out: How Sexuality is Used to Attack Women's Organizing* (International Gay and Lesbian Human Rights Commission and Center for Women's Global Leadership 2005).

<sup>35</sup> Rome Statute (n 4) art 7(1)(g), art 8(b)(xxii), art 8(e)(vi).

<sup>36</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002' (09 September 2002) ICC-ASP/1/3 (Part II.B) fn 3.

<sup>37</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court (n 36) art 6(b)(2)-(4).

<sup>38</sup> Rome Statute (n 4) art 7(1)(g), art 8(b)(xxii), art 8(e)(vi).

<sup>39</sup> Rome Statute (n 4) art 7(1)(h).

<sup>40</sup> Benedetti, Bonneau and Washburn (n 28); Machteld Boot, 'Article 7 Crimes against Humanity para. 1 (g) Rape ... or any other form of sexual violence of comparable gravity' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2<sup>nd</sup> edn, CH Beck 2008); Brouwer (n 9); Nichole Eva Erb, 'Gender-Based Crimes under the Draft Statute of the Permanent International Criminal Court' (1998) 29 Columbia Human Rights Law Review 401; Brook Sari Moshan, 'Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity' (1998) 22 Fordham International Law Journal 154.

generally considered one of the most progressive and broad definitions of rape under international and national law.<sup>41</sup> However, from a feminist perspective, the formulation ‘invasion resulting in penetration’ in the first element of the ICC definition<sup>42</sup> is puzzling. While the actors in the ICC negotiations could have relied solely on the broad and gender-neutral *Akayesu* precedent,<sup>43</sup> they combined it with the rape definition developed by the ICTY in the *Furundžija* case that reflects many national laws.<sup>44</sup> This can be interpreted as regressive and limiting.<sup>45</sup> By using the term ‘penetration’, the ICC reverted to a male definition of rape that is “rooted in social preoccupation with women’s chastity and ascertaining paternity of children, that tends to shift the focus to honor rather than the integrity of the person.”<sup>46</sup> It represents the perpetrator’s point of view and focuses on the physical aspect of rape. ‘Invasion’, in contrast, illustrates the survivor’s point of view.<sup>47</sup> This term is broader than ‘penetration’ as it connotes not only a physical, but also a psychological invasion of a person’s autonomy, self-determination and integrity. Moreover, the ICC rape definition includes a limiting reference to body parts, which potentially makes it more difficult for survivors to build a case because they have to go

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<sup>41</sup> Interview 13 (n 2); Michael Cottier, ‘Article 8 War Crimes para. 2 (b) (xxii) Rape and other forms of sexual violence’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2<sup>nd</sup> edn, CH Beck 2008).

<sup>42</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court (n 36) art 7(1)(g)(1), art 8(2)(b)(xxii)(1), art 8(2)(e)(vi)(1): The first element of the ICC rape definition reads: “The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.” The second element to the definition of rape as a crime against humanity and as a war crime reads: “The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” The third and fourth element of the rape definition is related to the qualifying elements of crimes against humanity and war crimes.

<sup>43</sup> *Akayesu* Trial Judgment (n 12) para 598.

<sup>44</sup> *Furundžija* Trial Judgment (n 13) para 185.

<sup>45</sup> Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 778; Human Rights Watch, ‘Commentary on the Second Preparatory Commission on Rules of Procedure and Elements of Crime’ (n 3); United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3).

<sup>46</sup> Human Rights Watch, ‘Commentary on the Second Preparatory Commission on Rules of Procedure and Elements of Crime’ (n 3); United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 24.

<sup>47</sup> Kristen Boon, ‘Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent’ (2001) 32 Columbia Human Rights Law Review 625; Brouwer (n 9) 107.

into great detail about the physical aspects of the rape. Not only can this be difficult for survivors, it may also infringe upon cultural sensitivities.<sup>48</sup>

While research on the evolution of the ICC and its instruments analyses and assesses the court's rape definition, it seldom examines the process of defining rape itself, which took place after the Rome Conference in the PrepCom2. When the process of defining rape is considered, it is merely noted that the *ad hoc* tribunals' definitions influenced the ICC definition.<sup>49</sup>

While war rape was extensively discussed in the ICC negotiations, forced marriage in times of armed conflict was mentioned as a form of sexual slavery but not discussed further.<sup>50</sup> This disregard is puzzling, considering the widespread use of forced marriage in, for example, the conflicts in Liberia,<sup>51</sup> Sierra Leone<sup>52</sup> and Uganda<sup>53</sup> that were ongoing while the ICC instruments were negotiated and could have been considered by the court.<sup>54</sup> It is a lost opportunity to raise awareness of and directly acknowledge forced marriage not only as a harmful experience, but also as a wrong requiring legal redress. Explicitly including forced marriage in the Rome Statute would have legitimised women's experiences during and after armed conflicts and enabled the court to fully address them.<sup>55</sup>

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<sup>48</sup> Brouwer (n 9) 115.

<sup>49</sup> Publications that comment on the making of the ICC rape definition include Boon (n 47); Cottier (n 41); Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003); Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes' in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Volume 7, Martinus Nijhoff Publishers 2003); Eve La Haye, 'Article 8(2)(b)(xii): Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001).

Eve La Haye (n 49) is an exception. She provides a more detailed analysis, also including relevant state proposals and reasons for supporting certain wordings.

<sup>50</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court' (December 1997) <<http://www.iccnw.org/documents/5PrepComRecommWomensC.pdf>> accessed 04 December 2013.

For publications mentioning forced marriage in the context of the ICC see for example Brouwer (n 9) 137-141; Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 Michigan Journal of International Law 605.

<sup>51</sup> Women Under Siege, 'Liberia' (n 6).

<sup>52</sup> Chris Coulter, *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone* (Cornell University Press 2009); Women Under Siege, 'Sierra Leone' (n 6).

<sup>53</sup> Carlson and Mazurana (n 6).

<sup>54</sup> International Criminal Court, 'Situations and Cases: Uganda' (n 7).

<sup>55</sup> Valerie Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone: Legal Advances and Conceptual Difficulties' (2011) 2 Journal of International Humanitarian Legal Studies 127.

### *1.3 Research questions and hypotheses*

Against this background, it is of interest and importance to analyse how the ICC definitions of war rape and forced marriage in times of armed conflict came about. Secondary research questions are:

1. Who were the driving actors in the process of defining war rape and seeking to define forced marriage?
2. What influenced them?
3. What was their understanding of war rape and forced marriage?
4. How did the driving actors influence the ICC negotiations of war rape and forced marriage?

The following hypotheses are considered:

1. NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage;
2. States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage;
3. Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage;
4. Survivors of war rape and forced marriage and actors from the global South were not involved;
5. War rape and forced marriage were interpreted as honour crimes;
6. Structural causes of the perpetration of war rape and forced marriage were not addressed.

From a feminist and constructivist perspective, it is necessary to consider the actors as well as the normative structures that shape actors' understandings of war rape and forced marriage, and consequently law-making. International Law is made by women and men, state and non-state actors. Their interests and actions are shaped by personal, national and international values, norms and rules and influence law-making processes and outcomes. Therefore, law(-making) is biased. Arguably, this bias can be decreased through the intervention of outside actors.

Supported by preliminary research, a combined feminist and constructivist analysis of the actors in the ICC negotiations suggested that NGOs in general and women's

organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage. Preliminary research also suggested that states with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of more progressive laws. This claim supports the constructivist theory that domestic norms matter in international relations and law-making, here in the sense of opposing progressive definitions of rape and forced marriage. A feminist analysis of the ICC negotiations raises the question whether survivors of sexualised war violence were involved as their participation would give a voice to those unheard and contribute to women's empowerment. Considering that the ICC is an international court with jurisdiction over all states that ratified the Rome Statute, it is of interest and relevance to examine whether that was reflected in the ICC negotiations or whether actors from the global South were not involved. Tracing progress in the understanding of sexualised crimes, it has to be analysed whether sexualised crimes were understood as honour crimes or forms of structural violence. By addressing these hypotheses, continuities and/or discontinuities in international law-making processes can be highlighted and state-centric notions as well as the priority of international norms and rules in international treaty negotiations can be challenged.

#### *1.4 Chapter outline*

This thesis addresses these research questions and hypotheses in three steps. Part I consists of Chapters 2 and 3, setting out the theoretical and methods framework of this thesis. Chapters 4 and 5 form part II, which examines the legislative histories of war rape and forced marriage. Part III includes Chapters 6-9. They directly address the ICC negotiations and how the court's definitions of war rape and forced marriage came about.

Chapter 2 outlines feminism and constructivism as the main theories underpinning and applied in this thesis. Feminist and constructivist theorists understand reality to be constructed and are interested in its change. However, constructivists such as Martha Finnemore and Peter Katzenstein are interested in the fact that reality is constructed and the process of how it is constructed and how it changes. They emphasise the role of normative structures in international relations and law-making, shaping and being shaped



by actors (constructivist circle).<sup>56</sup> In their analysis of change, constructivist theorists focus on the role of domestic as well as international normative structures and on impetuses that are internal as well as external to actors. Constructivists establish the logics of consequences, arguing, practicality, purposive role playing, appropriateness, habit and emotions as possible explanations for normative change. Feminists, in contrast, are interested in the outcome of construction processes and their gendered implications. They are interested in the substance of reality and change. Feminist legal theories unmask and highlight sex/gender issues that are hidden by patriarchal structures such as legal rules, institutions and processes.<sup>57</sup>

After Chapter 2 discusses the theoretical underpinnings of this thesis, Chapter 3 outlines the methods used. Qualitative research methods are used as they are more appropriate than quantitative methods to create a better understanding of the ICC negotiations and how the definitions of war rape and forced marriage came about. Consistent with the theoretical basis of this thesis, feminist research methods<sup>58</sup> are

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<sup>56</sup> Milja Kurki and Andriana Sinclair, 'Hidden in Plain Sight: Constructivist Treatment of Social Context and its Limitations' (2010) 47 *International Politics* 1, 3-4; See also Martha Finnemore, *National Interests in International Society* (Cornell University Press 1996) 1-33; Peter Katzenstein, *Cultural Norms and National Security: Police and Military in Postwar Japan* (Cornell University Press 1996) 1-32.

For more information on constructivism see for example publications by Friedrich Kratochwil, Nicholas Onuf, Richard Price, Christian Reus-Smit, Thomas Risse, John Ruggie, Kathryn Sikkink, J Ann Tickner, Ole Wæver and Alexander Wendt.

<sup>57</sup> Emily Jackson and Nicola Lacey, 'Introducing Feminist Legal Theory' in Richard Nobles, James Penner and David Schiff (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford University Press 2002); Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (Sage Publications 1995) 189-190.

For more information on feminist theories and law see for example publications by Hilaire Barnett, Doris Buss, Hilary Charlesworth, Christine Chinkin, Rhonda Copelon, Kathleen Daly, Karen Engle, Judith Gardam, Janet Halley, Catharine A MacKinnon, Fionnuala Ni Aolain, Diane Otto and Carol Smart.

<sup>58</sup> For more information on feminist research methods see for example Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17 *Human Rights Quarterly* 509; Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379; Sandra Harding, 'Is there a Feminist Method?' in Sandra Harding (ed), *Feminism and Methodology* (Indiana University Press 1987); Sharlene Nagy Hesse-Biber, 'Feminist Research: Exploring the Interconnections of Epistemology, Methodology, and Method' in Sharlene Nagy Hesse-Biber (ed), *Handbook of Feminist Research* (Sage 2007); Sharlene Nagy Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Feminist Research Practice* (Sage 2007); Debbie Kralik and Antonia M van Loon, 'Feminist Research' in Cowman S and others (eds), *Nursing Research: Designs and Methods* (Churchill Livingstone Elsevier 2008); Maeve Landmann, 'Getting Quality in Qualitative Research: A Short Introduction to Feminist Methodology and Methods' (2006) 65 *Proceedings of Nutrition Society* 429; Julie Mertus and Pamela Goldberg, 'A Perspective on Women and International Human Rights after the Vienna Declaration: The Inside/Outside Construct' (1994) 26 *New York University Journal of International Law and Politics* 201; Amjad Nazeer, 'A Feminist Critique of International Human Rights and Humanitarian Law' (2010) <[http://issuu.com/amjadnazeer/docs/feminist\\_critique\\_of\\_ihrl\\_\\_\\_\\_ihl](http://issuu.com/amjadnazeer/docs/feminist_critique_of_ihrl____ihl)> accessed 29 January 2015; Shulamit Reinhartz, *Feminist Methods in Social Research* (Oxford University Press 1992).

employed. Their emphasis on reflexivity and authenticity necessitates reflecting on the present researcher's own biases and making them known to the reader. Chapter 3 also contains an outline of the critical analysis of existing literature and relevant documents as well as of the semi-structured interviews conducted with people who participated in the ICC negotiations for this research project.

Chapters 4 and 5 make up the second part of this thesis. Where they refer to the research questions and hypotheses stated above, they address the general focus thereof but do not contribute to an answer or confirmation of the specifics. The research questions and hypotheses specifically address the ICC negotiations of war rape and forced marriage and Chapters 4 and 5 provide the thematic context for their analysis. Chapter 4 retraces the pre-ICC legislative histories of the two crimes.<sup>59</sup> Chapter 5 focuses on legal discussions and developments that took place after the negotiations of the Rome Statute and the Elements

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<sup>59</sup> For further information on the legislative histories of war rape and forced marriage see for example publications by Kelly Dawn Askin; Valerie Oosterveld; See also Barbara Bedont, 'Gender-Specific Provisions in the Statute of the International Criminal Court' in Flavia Lattanzi and William A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court, Volume 1* (Editrice il Sirente 1999); Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Penguin Books 1977); Annie Bunting, "'Forced Marriage'" in Conflict Situations: Researching and Prosecuting Old Harms and New Crimes' [2012] Canadian Journal of Human Rights 165; Jocelyn Campanaro, 'Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes' (2001) 89 The Georgetown Law Journal 2557; Alison Cole, 'International Criminal Law and Sexual Violence: An Overview' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010); Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 McGill Law Journal 217; Judith Gardam and Michelle J Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International 2001); Halley, 'Rape at Rome' (n 34); Kristastout, 'What's In a Name? The Feasibility and Desirability of Naming Forced Marriage as a Separate Crime under International Humanitarian Law' (08 May 2012) <<http://de.scribd.com/doc/94709906/3/III-The-Constituent-Crimes-that-Underpin-the-Crime-of-Forced-Marriage>> accessed 06 December 2012; Suzanne Mattler and Michael P Scharf, 'Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime against Humanity' (2005) Case Research Paper Series in Legal Studies, Working Paper 05-35 <<http://ssrn.com/abstract=824291>> accessed 08 July 2013; Theodor Merton, 'Rape as a Crime under International Humanitarian Law' (1993) 87 American Journal of International Law 424; Fionnuala Ni Aolain, 'Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication' (2013) Minnesota Legal Studies Research Paper No. 13-19 <<http://ssrn.com/abstract=2247623>> accessed 06 May 2015; Amy Palmer, 'An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of "Forced Marriage"' (2009) 7 Northwestern Journal of International Human Rights 133; Noëlle NR Quéniwet, *Sexual Offenses in Armed Conflict and International Law* (Transnational Publishers 2005); Cate Steains, 'Gender Issues' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999); Bridgette A Toy-Cronin, 'What is Forced Marriage? Towards a Definition of Forced Marriage as a Crime against Humanity' (2010) 19 Columbia Journal of Gender and Law 539; Patricia Viseur Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law' in Gabrielle Kirk McDonald and Olivia Swaak (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Volume 1, Commentary* (Kluwer Law International 2000).

of Crimes were completed as well as on more theoretical considerations regarding the causes and meanings of war rape and forced marriage. Chapters 4 and 5 highlight that war rape was first defined as an honour crime before it was more adequately understood as a breach of a person's fundamental rights and established as a crime in its own right as well as potentially constituting other crimes such as torture and an act of genocide. Regarding the definition of rape itself, it developed from a conceptual coercion-based definition towards a mechanical coercion- and consent-based definition. In regard to forced marriage, a similar pattern can be noticed. First forced marriage was defined as a form of sexual slavery before it was considered whether it would be more adequate to see it as another inhumane act. As such, forced marriage was understood to include a forced conjugal association, acts of sexualised violence and forced labour. Regarding the causes and meanings of war rape and forced marriage, both crimes are understood to be weapons of war that are grounded in patriarchy, attributable to peacetime gender norms and stereotypes, and ways to regulate gender relationships. Forced marriages are also formed in wartime to create dependency structures within fighting groups. War rape is also used as a theme in propaganda. Comparing the legislative histories of war rape and forced marriage highlights that a conduct is established as a serious problem first and then discussed in the context of existing crimes before it is criminalised in its own right.

Part III of this thesis analyses how the ICC definitions of war rape and forced marriage came about and addresses the research questions and hypotheses stated above.

Chapter 6 focuses on the identity of actors involved in the ICC negotiations in general and on what generally influenced them. While this emphasis is derived from the general focus of Research Questions 1<sup>60</sup> and 2,<sup>61</sup> it does not attend to their specifics which address the ICC negotiations of war rape and forced marriage specifically. Chapter 6 argues that individuals, states and NGOs played an important role in the ICC negotiations. Refuting Hypothesis 4,<sup>62</sup> actors represented all parts of the world and included survivors of sexualised war violence. They were shaped and being shaped by personal, national and

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<sup>60</sup> Research Question 1 reads: Who were the driving actors in the process of defining war rape and seeking to define forced marriage?

<sup>61</sup> Research Question 2 reads: What influenced the driving actors?

<sup>62</sup> Hypothesis 4 supposes that survivors of sexualised war violence and actors from the global South were not involved in the ICC negotiations.

international values, norms and rules. However, practical and strategic considerations also came to play. Moreover, Chapter 6 argues that while participation of, and equality between, actors was furthered through their work in coalitions and caucuses, it was impeded by perpetuated traditional power dynamics. In addition, actors' ability to influence the ICC negotiations was limited by the need for consensus in all decisions. Despite this, actors influenced the ICC negotiations by conducting research and policy analysis, producing and distributing reports and proposals, organising briefings, and lobbying. Non-state actors' ability to influence the ICC negotiations was increased by being perceived as strategic partners of state actors. This enabled them to become members of state delegations or to teach their views to states.<sup>63</sup>

While Chapter 6 demonstrates how NGOs taught their views to states (Research Question 4),<sup>64</sup> Chapter 7 shows that they succeeded. It contains a detailed analysis of the developments in the ICC negotiations regarding the definitions of war rape and forced marriage, outlining who the main state and non-state actors were (Research Question 1), why they got involved in the ICC negotiations of the crimes of war rape and forced marriage specifically and what influenced their positions (Research Question 2) as well as how they interpreted the crimes (Research Question 3).

Confirming Hypothesis 1,<sup>65</sup> Chapter 7 demonstrates that the international Women's Caucus, an umbrella organisation of women's organisations and advocates, was a driving actor regarding the process of defining war rape and especially forced marriage in times of armed conflict. The Arab block<sup>66</sup> raised concerns regarding the definition of rape and sexual slavery (confirming Hypothesis 2<sup>67</sup>). In addition to the Women's Caucus and the Arab block, the International Committee of the Red Cross (ICRC) and the delegations of

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<sup>63</sup> Martha Finnemore (n 56) claims that NGOs are "active teachers" of states on the sense that NGOs as outside actors present problems and solutions to state governments. They teach their views to states by setting agendas, defining tasks and shaping interests of states.

<sup>64</sup> Research Question 4 reads: How did the driving actors influence the ICC negotiations of war rape and forced marriage?

<sup>65</sup> Hypothesis 1 reads: NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

<sup>66</sup> PrepCom2 'Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)' UN Doc PCNICC/1999/WGEC/DP.39: The Arab block included the delegations of Bahrain, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria and the United Arab Emirates.

<sup>67</sup> Hypothesis 2 reads: States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage.

Colombia and the United States of America (USA, US) drove the ICC negotiations of the crimes of war rape and forced marriage.

The Women's Caucus became active in the ICC negotiations of war rape and forced marriage to ensure that sexualised crimes were appropriately addressed, keeping women's concerns in mind. The ICRC's participation was motivated by its role as the guardian and expert of International Humanitarian Law. The Arab block engaged in this particular aspect of the ICC negotiations to protect national marriage laws and practices from international interference and from falling within the reach of crimes against humanity. Colombia was aware that it might fall to be investigated by the ICC. Therefore it had an interest in shaping the definitions of crimes its citizens might be accused of. The US insisted on defining the crimes under the jurisdiction of the ICC as it was concerned about its national sovereignty and worried that its own citizens might be prosecuted.

Refuting Hypothesis 6,<sup>68</sup> the Women's Caucus understood war rape to be a form of structural violence that is rooted in discrimination against women in peacetime. Based on the *Akayesu* definition, the Women's Caucus proposed an inclusive coercion-based rape definition that uses the term 'invasion'. The ICRC, in contrast, built its definition of rape on the *Furundžija* case and suggested to use the term 'penetration'. Contrary to the Women's Caucus and the ICRC, the US initially was influenced by its national laws and advanced a consent-based rape definition using the term 'penetration'. Eventually, however, it followed the Women's Caucus and suggested a coercion-based definition. Like the US, Colombia initially developed a definition of rape based on its national laws and suggested using the phrase 'to have sexual access to' before following the ICRC and suggesting a definition using the term 'penetration'. National normative structures also influenced the Arab block's understanding of rape as an honour crime which excludes marital sexual intercourse (confirming Hypotheses 3<sup>69</sup> and 5<sup>70</sup>). Chapter 7 argues that the final definition of rape as 'invasion resulting in penetration' was a compromise based on international and national rules.

Regarding forced marriage, the Women's Caucus was the first actor to bring up the issue in the ICC negotiations. Later, it was also explicitly mentioned by the ICRC.

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<sup>68</sup> Hypothesis 6 reads: Structural causes of the perpetration of war rape and forced marriage were not addressed.

<sup>69</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

<sup>70</sup> Hypothesis 5 reads: War rape and forced marriage were interpreted as honour crimes.

Following the understanding of the international community as well as the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, the Women's Caucus and the ICRC understood forced marriage as a form of sexual slavery. Therefore, it was seen as an exercise of powers attaching to the right of ownership and an emphasis was placed on the sexual elements of a forced marriage. Contrary to establishing a link between forced marriage and sexual slavery like the Women's Caucus and the ICRC, the Arab block explicitly suggested disconnecting sexual slavery from marital rights and duties. In a proposal submitted by the Holy See, the crime of sexual slavery was replaced by enslavement and involuntary servitude which could still include forced marriage. Like the crime of rape, forced marriage was understood as a question of honour by some and as a form of structural violence by others, confirming Hypothesis 5<sup>71</sup> and refuting Hypothesis 6.<sup>72</sup> Chapter 7 argues that the definition of forced marriage as a form of sexual slavery was guided by international normative structures in which it had only ever been discussed in that context. The outline of actors' understanding of forced marriage indicates that, in the negotiations of the crime of sexual slavery, the Women's Caucus and the ICRC as well as the Arab block and the Holy See played a role. In addition, the US, Colombia and Canada were also involved. Eventually, actors agreed that sexual slavery includes direct and indirect threats but not necessarily a pecuniary element. It was also recognised that the crime can be perpetrated by more than one person. The discussions confirmed the distinction between traditional and contemporary forms of slavery and established sexual slavery, enslavement and human trafficking as separate crimes despite overlaps.

Building on Chapters 6 and especially 7, Chapters 8 and 9 present a more detailed snapshot of specific parts of the ICC negotiations. Chapter 8 analyses how the Women's Caucus came to understand forced marriage as a form of sexual slavery. It explores if the Caucus incorrectly viewed forced marriage as essentially a sexual crime or if the sexual elements of a forced marriage were overemphasised. This could explain the group's interpretation of forced marriage as a form of sexual slavery. As mentioned in relation to Chapter 7, accounts of the discussions in the ICC negotiations also suggest that the Women's Caucus followed the opinion of the international community, interpreting forced

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<sup>71</sup> Hypothesis 5 reads: War rape and forced marriage were interpreted as honour crimes.

<sup>72</sup> Hypothesis 6 reads: Structural causes of the perpetration of war rape and forced marriage were not addressed.

marriage as a form of sexual slavery. Interpretations of the written recommendations and comments submitted by the Caucus at different stages of the negotiation process, however, suggest the group might have followed the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict and strategically framed forced marriage as a form of slavery to benefit from the connotations of the *jus cogens* nature of the norm.

Chapter 9 focuses on a proposal submitted by the Arab block,<sup>73</sup> dissenting from developments in International Criminal Law regarding the crimes of war rape and sexual slavery. This was motivated by the Arab block's wish to protect national marriage laws and practices from amounting to rape or sexual slavery, constituting crimes against humanity. Chapter 9 explores which national norms and rules exactly the Arab block might have wanted to protect. Therefore, it addresses Research Question 2.<sup>74</sup> Chapter 9 argues that domestic non-criminalisation of marital rape could explain the Arab block's suggestions regarding the ICC definition of rape. Two explanations are advanced for the non-criminalisation of marital rape under the Arab block's national laws: the "[Islamic legal principle that] a woman must always be obedient [and sexually available] to her husband"<sup>75</sup> and the patriarchal understanding of rape as an honour crime. Chapter 9 furthermore argues that the Arab block sought to exclude marriage rights, duties and obligations such as the ideal of an obedient wife, the accepted language of a marriage offer, understandings of dowry and maintenance as well as irregular and temporary marriages from powers attaching to the right of ownership because they allow for husbands to subjugate their wives. Fundamental to the Arab block's dissent towards developments in national and international law in regard to sexualised crimes is the wish to maintain existing patriarchal power structures.

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<sup>73</sup> PrepCom2 'Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)' (n 66).

<sup>74</sup> Research Question 2 reads: What influenced the driving actors?

<sup>75</sup> Elenor Abdella Doumato, 'Saudi Arabia' in Julia Breslin and Sanja Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010) <[http://www.freedomhouse.org/sites/default/files/inline\\_images/Saudi%20Arabia.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Saudi%20Arabia.pdf)> accessed 28 March 2014.

Finally, the Conclusion recapitulates the nature and expediency of feminist and constructivist theories for this research project. It summarises the main findings, drawing together the discussion of war rape and forced marriage respectively, the theories behind their perpetration, their legislative histories, the critique of the ICC definitions of war rape and forced marriage, and the analysis of the process of defining the two crimes. Based on this, the Conclusion considers whether the ICC definitions of war rape and forced marriage could have been different. It argues that actors' incompatible mandates, divergent or non-existent precedents, the policy of unanimity, differences in standing between state and non-state actors and the work in coalitions made different outcomes of the ICC negotiations in this regard unlikely. Comparing the criminalisation of war rape and forced marriage highlights that the unequal standing of the two crimes at the time of the ICC negotiation influenced the actors' approach to them. In addition to defining crimes in an adequate way, it is crucial that crimes are addressed in a suitable framework. Therefore, the Conclusion also addresses the bigger question whether International Criminal Law is an appropriate way to deal with war rape and forced marriage. When answering this question, shortcomings of International Criminal Law such as its male structures and oversimplification of complex problems as well as survivors' reluctance to participate in legal proceedings have to be considered. However, it also has to be acknowledged that international courts and tribunals take the causes, meanings, purposes and consequences of war rape and forced marriage into account in their deliberations. If one concludes that the international legal system is an appropriate framework to deal with war rape and forced marriage, arguably war rape is more suitable to be addressed through International Criminal Law than forced marriage as it is seen as a narrow act rather than a complex process. In addition to recapitulating the nature and expediency of feminist and constructivist theories, summarising the main findings, discussing whether the ICC definitions of war rape and forced marriage could have been different, and whether International Criminal Law is an adequate way to deal with the two crimes, the Conclusion addresses the thesis' potential contributions regarding deepening the understanding of the ICC negotiations of war rape and forced marriage, narrowing gaps in the existing literature, contributing a different view on the ICC rape definition, raising awareness of forced marriage in times of armed conflict and highlighting relevant factors that need to be considered in the process of internationally criminalising yet unrecognised acts of sexualised war violence. The Conclusion also draws attention to problems encountered in the course of this research project such as the state-centric focus of the official record of



the ICC negotiations. Lastly, it introduces areas for future research emerging from this thesis, including a different theoretical approach to the ICC negotiations and the relevance and role of national normative structures as well as an analysis of the application, influence and impact of the ICC definitions of war rape and forced marriage on national and international jurisprudence.

### *1.5 Aims and potential contributions*

Based on the above-mentioned critique of the ICC's approach to war rape and forced marriage, the aim of this thesis is to narrow the two aforementioned gaps in the existing literature regarding the process of defining war rape in itself and the neglect of forced marriage in the ICC negotiations.

By addressing forced marriage in the context of the ICC negotiations, the aim of this thesis is to raise awareness of the crime and to contribute towards its theorisation. By comparing war rape, a well-theorised and well-established crime, and forced marriage in times of armed conflict, which is still undergoing definition and theorisation, relevant factors that need to be considered in the process of criminalising yet unrecognised acts of sexualised war violence under International Law are highlighted.

Identifying shortcomings of the ICC definitions of war rape and forced marriage and how they came about can be a lesson for the future. Law-makers can learn from past mistakes and develop more adequate definitions of sexualised crimes committed in wartime in the future. More adequate definitions that better match survivors' experiences will facilitate obtaining legal redress.<sup>76</sup> Therefore, analysing the process of defining war rape and forced marriage in the ICC negotiations cannot only help law-makers to make better laws, but it can also help survivors. It serves the outcome of the law and therefore the survivors rather than the political fictions that are being protected.

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<sup>76</sup> Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55); Seifert (n 8).

## *1.6 Scope*

Even though International Criminal Law overlaps with Human Rights and International Humanitarian Law, it has to be stressed that those are not core areas of this thesis.

While national and regional norms and laws covering acts of sexualised war violence are referred to, this thesis places a clear focus on International Law as these are supposedly universal standards that all consenting parties should adhere to.

The present researcher is very aware that women and men play different and often overlapping roles in times of armed conflict. While men also become targets for acts of sexualised war violence, this thesis focuses on women as the majority of survivors. However, the thesis makes clear that this is not the only way in which women experience war. Their roles as survivors, witnesses and perpetrators of acts of war violence are touched upon but an in-depth analysis and discussion of all of them is too comprehensive and therefore beyond the scope of this thesis.

While acts of war rape are implicitly covered by other crimes such as genocide by imposing measures intended to prevent births,<sup>77</sup> this thesis focuses on provisions that explicitly mention war rape. While definitions of war rape, for example as an outrage upon personal dignity, are relevant for an analysis of the legislative history of the crime, this thesis focuses on the definition of rape as a crime in and of itself. This is motivated by the view that it is crucial to directly name crimes for what they are in order to advance women's rights. However, since no definition of the crime of forced marriage itself existed at the time of the ICC negotiations, this thesis also analyses forced marriage defined as a form of sexual slavery. This decision is further informed by the fact that the SCSL also discussed forced marriage in that context. However, even though the thesis discusses sexual slavery in relation to forced marriage, it is not examined independently.

Even though crimes like forced prostitution, trafficking in human beings and the recruitment of child soldiers can also become relevant when discussing forced marriage, this thesis does not place a particular emphasis on them or their relationship to forced marriage.

The analysis of the ICC definition of rape is clearly focused on the first element of the definition which, as explained above, raises questions especially in light of the initial progress made by the ICTR in defining rape.

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<sup>77</sup> *Akayesu* Trial Judgment (n 12) para 507-508.

As highlighted above, this thesis analyses and assesses the ICC definition of war rape and forced marriage. This serves as the starting point and motivation for the exploration of the process of how these definitions came about. It is not the aim of the thesis to analyse and assess the ICC definitions of the two crimes in detail as this has been done elsewhere.<sup>78</sup>

Since the focus of this thesis is on definitions of crimes and how they came about, the research does not consider the ICC's rules and procedures, staffing requirements, structures or special measures for survivors of sexualised war violence. It also does not examine how the definitions are used in the court's jurisprudence as this thesis focuses on the legislative process.

To contextualise women's and NGOs' involvement in the ICC negotiations, the participation of outside actors in other international fora is mentioned. A thorough analysis and comparison, however, is too comprehensive and therefore beyond the scope of this thesis.

While this thesis uses feminist and constructivist theories to guide the analysis of the ICC negotiations of war rape and forced marriage, it does not intend to analyse the theories themselves but to apply them to practice.

In accord with feminist and constructivist scepticism of generalisability, only a limited generalisability is aimed for in this thesis in relation to its potential contribution mentioned above.

Although potentially offering valuable insights, the addition of other theoretical lenses such as postcolonialism would sacrifice the depth of this research for breadth.

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<sup>78</sup> For an analysis and assessment of the ICC definitions of war rape and forced marriage see *supra* 51-52.

## **2 Theories**

### *2.1 Introduction*

Feminism and constructivism are the two main theories underpinning this thesis. Chapter 2 explains first feminist theories, then constructivist theories, and their respective value for this research project. Within the outline of feminist theories, Chapter 2 discusses law as a product of, and producing, realities, the male substance of law, male methods of law and the male legal subject. Within the field of constructivist theories, a focus is placed on Martha Finnemore's and Peter Katzenstein's claims regarding the relevance of international and national normative structures respectively in international relations. The chapter concludes with considering the shortcomings of feminism and constructivism, and advantages of a combined theoretical approach.

### *2.2 Feminism*

"Feminism is a varied and evolving philosophy and those who consider themselves to be 'feminist' are a diverse group with a broad range of perspectives."<sup>79</sup> This thesis does not follow one single feminist theory as many realities would be lost. Instead, it follows Hilary Charlesworth's understanding of feminist theories as "less a series of rival interpretations than a sort of archaeological dig where different methods are appropriate at the different levels of the excavation[;] a feminist explorer or [...] a world traveller, using different modes of transport according to the terrain."<sup>80</sup> While the present researcher is aware of the multitude of feminist theories, the singular 'feminism' is used throughout this thesis for reasons of readability. For the purpose of this thesis, feminists are considered to share the view that sex/gender is one important social structure or axis of social organisation and differentiation.<sup>81</sup> However, it is also recognised that sex/gender "is not the only, and even necessarily the most important way in which people are differentiated from

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<sup>79</sup> Dianne L Martin, 'Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies' (1998) 36 Osgoode Hall Law Journal 151, 152.

<sup>80</sup> Hilary Charlesworth, 'Feminists Critiques of International Law and Their Critics' [1995] Third World Legal Studies 1, 7.

<sup>81</sup> Charlesworth, 'Feminists Critiques of International Law and Their Critics' (n 80) 4; Jackson and Lacey (n 57) 784; Martin (n 79) 152.

each other.”<sup>82</sup> Depending on the particular context, nationality, race, culture, class, age, education, profession and sexual orientation may also play a role. In addition, feminist theories come together in taking a critical stance in their analysis of patriarchy.<sup>83</sup> For the purpose of this thesis, patriarchy is defined as “a system of society or government in which the father or eldest male is head of the family and descent is reckoned through the male line; a system of society or government in which men hold the power and women are largely excluded from it.”<sup>84</sup> This understanding highlights that “patriarchy is not a temporary imperfection in an otherwise adequate system; it is part of the structure of the system and is constantly reinforced by it.”<sup>85</sup>

Feminist legal theories are not so much a discrete theory but rather a genre which places sex/gender issues on the agenda of legal scholarship.<sup>86</sup> Feminist legal theories aim to show how, where and why the law, legal institutions and legal processes fail women.<sup>87</sup> Their project is to uncover and claim as valid the experiences of women.<sup>88</sup>

### 2.2.1 *The male substance of law*

“Feminist legal theories offer a thoroughgoing critique of law’s claim to be impartial and objective.”<sup>89</sup> They understand the substance of law to reflect a male point of view<sup>90</sup> as it is made by men and based on their norms, knowledge and experiences. “[I]ssues traditionally of concern to men become seen [and legitimised] as general human concerns, while ‘women’s concerns’ are relegated to a special, limited category.”<sup>91</sup> This is

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<sup>82</sup> Jackson and Lacey (n 57) 788.

<sup>83</sup> Charlesworth, ‘Feminists Critiques of International Law and Their Critics’ (n 80); Martin (n 79) 152.

<sup>84</sup> Oxford Dictionaries, ‘Patriarchy’ <<http://www.oxforddictionaries.com/definition/english/patriarchy>> accessed 24 April 2015.

<sup>85</sup> Charlesworth, ‘Feminists Critiques of International Law and Their Critics’ (n 80) 9.

<sup>86</sup> Jackson and Lacey (n 57) 789.

<sup>87</sup> Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing 1998) 93-119; Ngaire Naffine, ‘In Praise of Legal Feminism’ (2002) 22 *Legal Studies* 71, 73.

<sup>88</sup> Barnett (n 87) 93-119; Catharine MacKinnon, ‘Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence’ (1983) 8 *Signs* 635, 638.

<sup>89</sup> Jackson and Lacey (n 57) 779.

<sup>90</sup> Jackson and Lacey (n 57) 814; Smart (n 57) 189-190.

<sup>91</sup> Hilary Charlesworth, Christine Chinkin and Shelly Wright, ‘Feminist Approaches to International Law’ (1991) 85 *American Journal of International Law* 613, 625.

furthered by the public/private dichotomy<sup>92</sup> law rests on.<sup>93</sup> The first in the pair is established as dominant and associated with male characteristics while the second is seen as subordinate and associated with feminine characteristics. This shows that the distinction between the public and private sphere in law is not a neutral or objective qualification.<sup>94</sup> “Its consequences are gendered because in all societies men dominate the public sphere of politics and government and women are associated with the private sphere of home and family.”<sup>95</sup> Here, it has to be emphasised that “[w]omen are not always opposed to men in the same ways: what is considered ‘public’ in one society may well be seen as ‘private’ in another. But a universal pattern of identifying women’s activities as private, and thus of lesser value, can be detected.”<sup>96</sup> This creates gendered hierarchies. Specialised international legal instruments,<sup>97</sup> for example, distance ‘women’s issues’ from the mainstream of International Law. This marginalisation is aggravated by the extensive reservations from states to a number of provisions<sup>98</sup> and weak enforcement mechanisms.<sup>99</sup>

Another effect of the public/private dichotomy is to factor out the realities of women’s lives and to silence women’s voices in law. Demonstrating that law is a product

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<sup>92</sup> For further reading see Binion (n 58); Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 30-31, 43-44, 56-59; Charlesworth, Chinkin and Wright (n 91); Christine Chinkin, ‘A Critique of the Public/Private Dimension’ (1999) 10 *European Journal of International Law* 387.

<sup>93</sup> Like International Criminal Law in general, the ICC Rome Statute (n 4) can be interpreted to bridge the public/private dichotomy. Article 7(2)(f) links the private circumstance of pregnancy to the public cause of changing population compositions. This, however, subsumes the individual, gendered harm under the collective, ethnical harm. The Rome Statute also breaks the boundary between the public and the private sphere by recognising violent transgressions of a person’s integrity as crimes against humanity that are Human Rights violations which in turn regulate relationships between public and private actors.

<sup>94</sup> Charlesworth, ‘Feminist Methods in International Law’ (n 58) 383; Hilary Charlesworth, ‘The Hidden Gender of International Law’ (2002) 16 *Temple International and Comparative Law Journal* 93, 97; Charlesworth, Chinkin and Wright (n 91) 625-626.

<sup>95</sup> Charlesworth, ‘Feminist Methods in International Law’ (n 58) 383.

<sup>96</sup> Charlesworth, Chinkin and Wright (n 91) 626.

<sup>97</sup> For example the Convention on the Elimination of Discrimination against Women (18 December 1979) 1279 UNTS 13 (CEDAW).

<sup>98</sup> For example see UN Women, ‘Declarations, Reservations and Objections to CEDAW’ <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>> accessed 24 March 2014.

<sup>99</sup> For example see CEDAW (n 97) art 18; For further examples see International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 (ICESCR); See also Penelope Mathew, ‘Human Rights’ in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2<sup>nd</sup> edn, Oxford University Press 2005); Otto ‘Disconcerting “Masculinities”’ (n 10) 116; Diane Otto, ‘Feminist Approaches to International Law’ (23 March 2012) *Oxford Bibliographies* <<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml#obo-9780199796953-0055-div1-0004>> accessed 09 January 2015.

of, and produces, realities,<sup>100</sup> rape laws (superficially) were enacted to address the concerns of women and protect them against acts of sexualised violence perpetrated by men. However, they also determine what counts as rape. Therefore, they construct a limited range of truths that can be testified to in court. This at least partially silences survivors and tailors their stories.<sup>101</sup> It can distort the picture drawn of survivors' realities and establish a legal truth that is based on incomplete facts. If a rape definition for example does not recognise rape with objects, inserting objects into a woman's vagina legally does not count as rape. Since an element of invasion/penetration is key to rape definitions, acts falling short of that are not recognised as rape legally even though the survivor might have experienced or would describe them as such. When speaking about their experiences in a non-legal setting, survivors of war rape often focus on their feelings and on how having been raped changed their relationship to their family and community rather than on the perpetrator.<sup>102</sup> However, in a courtroom only the actions that demonstrate something about the perpetrator are of interest.<sup>103</sup>

In addition to creating gendered hierarchies and reinforcing gender stereotypes, law shapes identities.<sup>104</sup> It often portrays women as having to be protected, corrected or treated equally to men.<sup>105</sup> Rape laws, for example, construct women as vulnerable victims and men as aggressive perpetrators. Rape definitions that include references to body parts imply an underlying assumption that the victim is a woman and the perpetrator is a man. This becomes apparent, for example, in the view advanced in Article 219 of the Omani Penal Code that rape is "accomplished when the penis penetrates, to a minimal degree, the

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<sup>100</sup> Jackson and Lacey (n 57) 789.

<sup>101</sup> Doris Buss, 'Learning our Lesson? The Rwanda Tribunal Record on Prosecuting Rape' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010) 62; Marie-Benedicte Dembour and Emily Haslam, 'Silencing Hearings: Victim-Witnesses at War Crimes Trials' (2004) 15 *European Journal of International Law* 151, 158-60; Katherine M Franke, 'Gendered Subjects of Transitional Justice' (2006) 15 *Columbia Journal of Gender and Law* 813, 818; Julie Mertus, 'Shouting from the Bottom of the Well: The Impact of International Trials for wartime Rape on Women's Agency' (2004) 6 *International Feminist Journal of Politics* 110, 116; Fionnuala Ni Aolain, Dina Francesca Haynes and Naomi Cahn, 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425.

<sup>102</sup> *Foča* Testimony 1264, 1274 as cited in Mertus, 'Shouting from the Bottom of the Well' (n 101) 115.

<sup>103</sup> *Foča* Testimony 1427-1428 as cited *ibid*.

<sup>104</sup> Charlesworth, 'The Hidden Gender of International Law' (n 94) 97; Charlesworth, Chinkin and Wright (n 91) 625-626; Jackson and Lacey (n 57) 779, 784.

<sup>105</sup> Charlesworth and Chinkin (n 92) 212-218; For example see Charter of the United Nations (26 June 1945) 1 UNTS XVI, 59 Stat 1031, 3 Bevans 1153, TS 993 art 1(3), art 13, art 55(c), art 76(c); Convention on the Nationality of Married Women (29 January 1957) 309 UNTS 65; Geneva Convention (III) Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135 art 12, art 14, art 49.

vagina or anus of the victim, either resulting in ejaculation or not.”<sup>106</sup> Article 439 of the Syrian penal code defines rape as a situation “when a man forces a woman [...] to have intercourse.”<sup>107</sup> Protective rape definitions like the one set out in Article 27(2) of the fourth Geneva Convention reading “[w]omen shall be [...] protected against any attack on their honour, in particular against rape”<sup>108</sup> stress women’s vulnerability. Force requirements like the second element of the *Furundžija* definition, specifying that sexual penetration was achieved “by coercion or force or threat of force against the victim or a third person”,<sup>109</sup> indicate the aggressive nature of the perpetrator’s acts.

As indicated above, the crimes of rape and forced marriage are excellent examples of substantively male laws. A definition of war rape using the term ‘penetration’ can be seen as male as it is “rooted in social preoccupation with women’s chastity and ascertaining paternity of children, that tends to shift the focus to honor rather than the integrity of the person.”<sup>110</sup> This advances a male understanding of women as reproducers, preservers of civil society and the property of men. The categorisation of rape as an honour crime “legitimise[s] and entrench[es] the idea that the rape [...] harmed a wife, daughter, or sister because it impugned a husband’s, father’s, or brother’s honor.”<sup>111</sup> Therefore, the understanding of war rape as an honour crime leads to women being seen only in relation to another (male) person instead of as an individual.<sup>112</sup>

The categorisation of forced marriage in times of armed conflict as a form of sexual slavery can also be understood as male as it leaves the traditionally patriarchal institution of marriage untouched. Moreover, the classification of forced marriage as a form of sexual slavery narrowly focuses on sexualised crimes. It fails to capture the full range of women’s

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<sup>106</sup> Omani Penal Code (n 20).

<sup>107</sup> U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, ‘2009 Human Rights Report: Syria’ (n 20).

<sup>108</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, 6 UST 3516, TIAS 3365.

<sup>109</sup> *Furundžija* Trial Judgment (n 13) para 185.

<sup>110</sup> Human Rights Watch, ‘Commentary on the Second Preparatory Commission on Rules of Procedure and Elements of Crime’ (n 3); United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 24.

<sup>111</sup> Halley, ‘Rape at Rome’ (n 34) 57.

<sup>112</sup> Halley, ‘Rape at Rome’ (n 34) 56-58; Quénivet (n 59) 94-95.



experiences in times of war as well as of harms encompassed within gender-based violence.<sup>113</sup>

In addition, the classification of forced marriage as a form of sexual slavery as well as a mechanical definition of rape could be described as non-female, if not male, as they differ from the understanding female survivors have of the event. Forced wives see themselves just as that, forced wives who have all duties related to this status including, but not limited to, sexual intercourse. They do not consider themselves as slaves.<sup>114</sup> For many rape survivors, it is irrelevant if they were raped vaginally, anally or orally with a body part or an object. They do not experience rape merely as a physical violation but also as a psychological one. Additionally, women may experience acts falling short of penetration as rape in the sense of a violation of their integrity.<sup>115</sup>

While it has been demonstrated here that the crimes of rape and forced marriage are examples of substantively male laws, the following chapters of this thesis show that, based on the sex/gender of the actors who participated in the process of defining war rape and forced marriage in the ICC negotiations, the ICC definitions cannot be classified as such. Women's groups and advocates were highly involved in the process of defining sexualised crimes.<sup>116</sup> However, as further outlined below, they followed male reasoning processes. Following Carol Smart, this means that the actors can be classified as male after all as "maleness or masculinity, once embedded in values and practices [such as legal reasoning processes], need not be exhaustively anchored to the male biological referent, that is, men."<sup>117</sup>

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<sup>113</sup> Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409, 415; See also Charlesworth, 'Feminist Methods in International Law' (n 58); Christine Chinkin, 'Feminist Interventions into International Law' (1992) 12 *Australian Yearbook of International Law* 13; Christine Chinkin, 'Gender-Related Violence and International Criminal Law and Justice' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 81; Ni Aolain, Haynes and Cahn (n 101).

<sup>114</sup> See Chapters 4, 5 and 8 for more information.

<sup>115</sup> See Chapters 4 and 5 for more information.

<sup>116</sup> See Chapters 6-8 for more information.

<sup>117</sup> Smart (n 57) 189.

### 2.2.2 Male methods of law

Building on the above arguments regarding the substance of law, feminists view the very methods of law, its reasoning processes, as gendered to the disadvantage of women. This assessment can be linked to the work of Carol Gilligan.<sup>118</sup> Based on her rights and responsibilities study that was designed to explore different conceptions of morality and self, Gilligan claimed that a masculine type of reasoning focuses on ethics of individual rights and justice, and includes notions of fairness, logic and rationality. A feminine type of reasoning, in contrast, emphasises ethics of care, including relationships, contexts and communication. Law “lays claim to [autonomy, impartiality,] rationality, objectiveness, and abstraction, characteristics traditionally associated with men, and is defined in contrast to emotion, subjectivity, and contextualized thinking.”<sup>119</sup> Bridging or even breaking down the divide between male and female reasoning, commentators, however, suggest that contextualised reasoning is not incompatible with a male model of abstract thinking.

“All major forms of legal reasoning encompass processes of both contextualization and abstraction. Even the most conventional legal methods require that one look carefully at the factual context of a case in order to identify similarities and differences between that case and others.”<sup>120</sup>

Just as conventional methods require contextualisation, feminist methods need to separate the insignificant from the significant, for example facts related to ‘the woman question’.<sup>121</sup> Based on this process of abstraction, facts can be contextualised and compared to other cases. *Vice versa*, noticing similarities between cases and contextualising them this way can be the basis for identifying these facts as significant for a particular purpose.<sup>122</sup>

Similar to the relationship between contextualisation and abstraction, feminine subjectivity and emotions are not incompatible with male rationality. Feminist methods value openly revealing one’s biases by stating explicitly which moral and political choices underlie that partiality. Linked to this, recognising one’s own implications on research

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<sup>118</sup> Jackson and Lacey (n 57) 818; Smart (n 57) 189-190.

<sup>119</sup> Charlesworth, ‘The Hidden Gender of International Law’ (n 94) 94, 96; See also Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (2<sup>nd</sup> edn, Harvard University Press 1993).

<sup>120</sup> Katharine Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harvard Law Review 829, 856.

<sup>121</sup> Bartlett (n 120) 837; Harding, ‘Is there a Feminist Method?’ (n 58) 6-8: ‘The woman question’ asks about the gender implications of rules and social practices which may otherwise appear to be objective or neutral. Asking ‘the woman question’ as a research method is discussed in detail in part 3.3.

<sup>122</sup> Bartlett (n 120) 856.

processes and outcomes is valued. In addition, feminist methods strive to integrate emotive elements. Nevertheless, feminist methods are, and must be, reasonable. After all, they strive to make more sense of human experience, not less.<sup>123</sup>

Legal methods and reasoning processes in the ICC negotiations of sexualised crimes followed traditional legal reasoning. The ICC negotiations were a conservative exercise, clarifying existing law but not creating new crimes.<sup>124</sup> The ICC negotiations of the crime of rape are an excellent example.<sup>125</sup> Based on fifty years of developments regarding the criminalisation of war rape, the actors in the ICC negotiations defined sexualised war violence as an issue that needed to be addressed. They chose to deviate from the definition of rape set out in the fourth Geneva Convention and employ precedents especially from the *ad hoc* tribunals for the former Yugoslavia and Rwanda. Due to different views on the rape definitions developed by the Yugoslavia and Rwanda tribunals as well as divergent national laws, delegates arrived at a compromise definition including elements of various rape definitions that existed at the time.

In contrast, the inclusion of the crime of sexual slavery in the list of sexualised crimes of the Rome Statute as well as developing its definition was a more creative legal exercise.<sup>126</sup> Sexual slavery had not constituted an international crime in its own right before the adoption of the Rome Statute and related international rules were not very precise. Even though slavery was one of the earliest Human Rights violations to be recognised as a crime under International Law, it only became the subject of an international treaty in 1926.<sup>127</sup> International rules evolved to address new forms of slavery including servitude and forced labour.<sup>128</sup> The explicit inclusion of sexual slavery in the Rome Statute was further facilitated by international norms related to the crime as

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<sup>123</sup> Bartlett (n 120) 857-858; Harding, 'Is there a Feminist Method?' (n 58) 7.

<sup>124</sup> Interview 18 (n 5).

<sup>125</sup> See part 7.2 for a detailed discussion of the ICC negotiations of war rape.

<sup>126</sup> See part 7.3 for a detailed discussion of the ICC negotiations of forced marriage.

<sup>127</sup> Convention to Suppress the Slave Trade and Slavery (25 September 1926) 60 LNTS 253, Registered No. 1414 (Slavery Convention).

<sup>128</sup> African Charter on Human Rights and Peoples' Rights (27 June 1981) OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) (Banjul Charter) art 5; American Convention on Human Rights (22 November 1969) (Pact of San Jose) art 6(1); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (04 November 1950) 213 UNTS 222 (ECHR) art 4(1); ICCPR (n 99) art 8; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (07 September 1956) 266 UNTS 3 (Supplementary Slavery Convention); Universal Declaration of Human Rights (10 December 1948) UN Doc A/RES/217 A (III) (UDHR) art 4.

discussed previously at the World Conference on Human Rights (Vienna Conference) and the Fourth World Conference on Women (Beijing Conference) and also in reports of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict and the UN Special Rapporteur on Violence against Women, its Causes and Consequences.<sup>129</sup> Reflecting customary law, the explicit inclusion of sexual slavery in the Rome Statute represents the codification of a specific kind of slavery that is increasingly recognised as a major problem worldwide. It reflects a development of thought. What had historically been categorised as forced prostitution – for example the treatment of the comfort women during the Second World War – was understood to be more accurately and appropriately termed sexual slavery fifty years later when the ICC negotiations took place. However, the cautious approach delegates took in defining sexual slavery reveals traditional legal reasoning and the importance of legal precedents. Delegates stayed away from a more progressive definition that could have explicitly included forced marriage in times of armed conflict and relied on established international rules like the (Supplementary) Slavery Convention in defining the crime. The ICC negotiations of the crime of sexual slavery are an excellent example that existing rules cannot be rejected as they

“represent accumulated past wisdom, which must be reconciled with the contingencies and practicalities presented by fresh facts. [...] Ideally, however, rules leave room for the new insights and perspectives generated by new contexts. [...] [T]he specific circumstances of a new case may dictate novel readings and applications of rules, readings and applications that not only were not, but could not or should not have been determined in advance.”<sup>130</sup>

This excursus on the ICC negotiations of war rape and forced marriage demonstrated that actors used male methods of law and reasoning processes as they defined an issue, analysed relevant precedents and recommended a conclusion based on logic and abstraction. However, sexualised war violence against women was defined as an issue to be legally addressed. Employing female reasoning in the sense of contextualisation, precedents were analysed open-mindedly, making room for the new insights and perspectives generated by new contexts.

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<sup>129</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 615.

<sup>130</sup> Bartlett (n 120) 852-853.

### 2.2.3 *The male legal subject*

In addition to a male legal substance and method, feminist legal theories claim that the legal subject is implicitly a man “[t]o the extent that law’s construction of its subjects is in terms of the characteristics of the first members of [binary] pairs [such as male/female, subject/object and public/private].”<sup>131</sup> As we see in the example of the ICC definition of rape,<sup>132</sup> it is explicitly stated in a footnote that the definition is intended to be gender-neutral. However, the specification that the “perpetrator invaded [...] any part of the body of the victim or of the perpetrator with a sexual organ”<sup>133</sup> implicitly assumes that the perpetrator and subject of the definition is a man. Similarly, at first glance, the ICC definition of sexual slavery is gender-neutral. However, as mentioned above, a footnote elaborates that “[i]t is [...] understood that the conduct described in [the elements of the crime of sexual slavery] includes trafficking in persons, in particular women and children.”<sup>134</sup> While this does not necessarily establish men as the subject of this particular law, it constructs women (and children) as its objects. Thus it could be argued that it implicitly makes men the subject.

In relation to the claim that the substance, method and subject of law are male, it has to be stressed that men just as women are not a homogenous group. Differences exist between different men and different women as well as between the sexes. While the first members of the binary pairs mentioned above are culturally marked as masculine and the second as feminine, they do not express the whole of men’s and women’s lives.<sup>135</sup> Furthermore, it is important to keep in mind the problematic implication that men and women are naturally endowed with certain characteristics. This easily slides into sociobiologism, ignoring that the feminine is defined by a patriarchal culture where difference implies gender hierarchies.<sup>136</sup> It also has to be stressed that different men and different women hold different views on different issues. Where this thesis interprets the substance, method and subject of law as male based on feminist theories, the present researcher is aware that that does not reflect the (only) viewpoint of (all) men.

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<sup>131</sup> Jackson and Lacey (n 57) 815; See also Smart (n 57) 189-190.

<sup>132</sup> PrepCom2 ‘Report of the Preparatory Commission for the International Criminal Court, Addendum: Part II, Finalized draft text of the Elements of Crimes’ (02 November 2000) PCNICC/2000/1/Add.2 art 7(1)(g)(1), art 8(2)(b)(xxii)(1).

<sup>133</sup> PrepCom2 ‘Report of the Preparatory Commission’ (n 132) art 7(1)(g)(1)(1), art 8(2)(b)(xxii)(1)(1).

<sup>134</sup> PrepCom2 ‘Report of the Preparatory Commission’ (n 132) fn 18, fn 53.

<sup>135</sup> Jackson and Lacey (n 57) 815-816.

<sup>136</sup> Charlesworth and Chinkin (n 92) 40-42.

#### 2.2.4 Rationales for using feminist theories

Feminist ideas underpin the present researcher's understandings of the research topic and its relevance. In this sense, the decision to apply feminist theories was a practical one. The subject of the research project is an issue of gender. War rape and forced marriage in times of armed conflict are gendered crimes as they target women and men to different extents, in different ways and for different purposes. Acts of gender-based violence include violations that are based on, and perpetuate, socially constructed or stereotyped gender roles, and the power differences between women and men. In addition to the crimes discussed in this thesis, law-making is gendered. Women and men are involved in law-making processes to different extents. Consequently, law-making and its outcomes reflect a male type of reasoning and male concerns. Feminist theories are useful to address these issues of gender.

#### 2.3 Constructivism

Like feminism, constructivism is not a single, unified approach.<sup>137</sup> “[T]here is vibrant debate within constructivism, with competing understandings [amongst others] of logics of interaction.”<sup>138</sup> Nevertheless, it is possible to define certain key assumptions and ideas that are held in common by most constructivist scholars. They “focus on the analysis of processes of social construction and the role of identity in politics; emphasise the importance of ideas, norms and inter-subjectivity in social actions; and highlight possibilities of social change.”<sup>139</sup> Constructivists assume that the world is socially constructed by people. Therefore it can change and constructivists seek to explain these changes. They understand people's backgrounds to influence their identities<sup>140</sup> and

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<sup>137</sup> While the present researcher is aware of the multitude of constructivist theories, the singular ‘constructivism’ is used in this thesis for reasons of readability.

<sup>138</sup> Jutta Brunnée and Stephen J Toope, ‘Constructivism and International Law’ in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 9 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2088132](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2088132)> accessed 14 January 2015.

<sup>139</sup> Kurki and Sinclair (n 56) 1, 3: They are often associated with key mainstream constructivist authors such as John Ruggie, Alexander Wendt, Friedrich Kratochwil, Thomas Risse, Richard Price and Christian Reus-Smit.

<sup>140</sup> Joanna WA Rummens, *Personal Identity and Social Structure in Sint Maartin/Saint Martin: A Plural Identities Approach*, Unpublished PhD Thesis (York University 1993): For the purpose of this thesis, identity is understood as a person's idea and expression of their own (self-identity) and others' individuality or

interests, and to be largely made up of normative structures. Constructivists also recognise material structures but understand their content and significance to be directed by normative structures. Normative structures influence actors' identities and interests through the logic of consequences (instrumentalism), appropriateness (morality and ethics), arguing (rational oppositional discourse), practicality (practice), purposive role playing, habit (unreflected action) and emotions. Actors' identities and interests influence their actions which can lead to change in normative structures (constructivist circle).<sup>141</sup>

The relevant actors for this thesis are state and NGO delegations and their members that participated in the ICC negotiations. For the purpose of this thesis, a state is an entity with "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."<sup>142</sup> NGOs are defined as "a not-for-profit group, principally independent from government, which is organized on a local, national or international level to address issues in support of the public good. [An NGO is] [t]ask-oriented and made up of people with a common interest".<sup>143</sup> Although some organisations have government officials as their members, they are still considered NGOs here. Even though the ICRC has a hybrid nature, including characteristics of an NGO and an International Organisation,<sup>144</sup> for the purpose of this thesis, it is included in the category of NGOs as this is the role of interest for this research. The terms 'NGO', 'civil society' and 'non-state actors' are used synonymously.<sup>145</sup>

Structures that will be considered are relevant personal, national and international values, norms and rules. Constructivist theories in themselves are unclear about how values, norms and rules are defined.<sup>146</sup> For the purpose of this thesis, a value is one's

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membership in a group (for example cultural and national identity). Identity is the "distinctive characteristic belonging to any given individual, or shared by all members of a particular social category or group." Identity is relational and contextual. Identity is influenced for example by gender, age, interpersonal interactions, living environments, media, nationality, ethnicity, culture, language, religion and tradition.

<sup>141</sup> Brunnée and Toope (n 138) 7; Kurki and Sinclair (n 56) 1, 3-4; See also Finnemore (n 56) 1-33; Katzenstein (n 56) 1-32.

<sup>142</sup> Montevideo Convention on Rights and Duties of States (26 December 1933) 165 INTS 19 art 1.

<sup>143</sup> United Nations Rule of Law, 'Non-governmental Organizations' <[http://www.unrol.org/article.aspx?article\\_id=23](http://www.unrol.org/article.aspx?article_id=23)> accessed 10 April 2015.

<sup>144</sup> International Committee of the Red Cross, 'The ICRC's Status: In a Class of Its Own' <<https://www.icrc.org/eng/resources/documents/misc/5w9fjy.htm>> accessed 17 June 2015.

<sup>145</sup> Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 Michigan Journal of International Law 183, 187-188; United Nations Rule of Law (n 143).

<sup>146</sup> Finnemore (n 56) 16; Katzenstein (n 56); Christian Reus-Smit, 'Constructivism' in Scott Burchill and others (eds), *Theory of International Relations* (3rd edn, Palgrave Macmillan 2005); Christian Reus-Smit, 'Introduction' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004) 22; See Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and*

judgment of what is important in life. Norms are “standards of behaviour created through mutual expectation in a social setting.”<sup>147</sup> They are understood as emanating from shared values and as the basis of legally enforceable rules.<sup>148</sup> Rules are legal norms, sets of regulations governing conduct. Using the example of war rape, the judgment in *Prosecutor v Jean-Paul Akayesu* passed by the ICTR defines rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.<sup>149</sup> Enforcing this rule, Jean-Paul Akayesu was sentenced to 15 years’ imprisonment for rape, constituting a crime against humanity.<sup>150</sup> In the *Furundžija* trial,<sup>151</sup> the ICTY defined rape as

“(i) the sexual penetration, however slight:  
 (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or  
 (b) of the mouth of the victim by the penis of the perpetrator;  
 (ii) by coercion or force or threat of force against the victim or a third person.”

Anto Furundžija was sentenced to eight years’ imprisonment for outrages upon personal dignity, including rape, constituting a war crime.<sup>152</sup> Even though the rules on rape referred to above differ from each other, they are based on the same norm of ‘do not touch’ which is based on the value of bodily integrity.

Since normative structures with regard to marriage differ considerably depending on the social context, this thought-experiment is more complex in the case of forced marriage. In a Western European context, the value of self-determination gives rise to the norm to be free to choose whom, when and how to marry. This creates the foundation for rules such as Article 16(2) of the Universal Declaration of Human Rights (UDHR) which states that “[m]arriage shall be entered into only with the free and full consent of the intending spouses”.<sup>153</sup> Another rule on marriage is Article 16 of the Convention on the

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*Institutional Rationality in International Relations* (Princeton University Press 1999) on fundamental institutions and the constituting role of state identity.

<sup>147</sup> Brunnée and Toope (n 138) 1.

<sup>148</sup> See Boyle and Chinkin (n 34).

<sup>149</sup> *Akayesu* Trial Judgment (n 12) para 688.

<sup>150</sup> *Prosecutor v Jean-Paul Akayesu* (Sentence) ICTR-96-4-T (02 October 1998).

<sup>151</sup> *Furundžija* Trial Judgment (n 13) para 185.

<sup>152</sup> *Furundžija* Trial Judgment (n 13) section IX.

<sup>153</sup> UDHR (n 128) art 16(2).



Elimination of All Forms of Discrimination against Women (CEDAW)<sup>154</sup> which calls on states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations”,<sup>155</sup> including the same right to freely enter into marriage.

### *2.3.1 The constructivist theories of Martha Finnemore and Peter Katzenstein*

Martha Finnemore can be understood as a representative of systemic constructivism, concentrating on interactions between state actors rather than on what happens within states. Therefore, systemic constructivism focuses on the international domain. Finnemore placed a focus on international norms and the way they influence actors’ identities and in turn interests and actions. Finnemore claimed that NGOs are “active teachers” of states. NGOs as outside actors present problems and solutions to state governments. They teach their views to states by setting agendas, defining tasks and shaping interests of states.<sup>156</sup> This way, NGOs not only influence states’ actions but also their identities. Therefore, Finnemore’s theory allows for examining shifts in states’ actions and for tracing the causes of these shifts back to normative claims made by NGOs.<sup>157</sup> To demonstrate this, she used the example of the ICRC established by Henry Dunant and other committed policy entrepreneurs. The non-governmental organisation was built specifically to promote humanitarian norms that were opposed by states at the time as limiting their sovereignty or war-making powers.<sup>158</sup> By focusing on structures and actors,

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<sup>154</sup> CEDAW (n 97).

<sup>155</sup> CEDAW (n 97) art 16(e).

<sup>156</sup> Finnemore (n 56) 12: Finnemore contrasted this teaching with learning processes where states learn from each other or from NGOs. The difference is that in this learning process, “the impetus for learning [...] lies inside the state. What is causal lies at the state or sub-state level. There are no active teachers in this process. To the extent that states are taught, they are self-taught.” It can be argued that the term ‘teach’ downplays states’ understanding of an issue and overrates the effect NGOs have on states. It indicates bias for NGOs. Against this background, ‘influence’ may be a more appropriate, if more cautious term to use. However, if ‘teaching’ is understood as introducing someone to (a different angle on) a topic, as imparting information rather than as instructing someone what to do or how to do something, the term reflects the role NGOs played in the ICC negotiations. Therefore, it is maintained in this thesis.

<sup>157</sup> Finnemore (n 56) 1-33.

<sup>158</sup> Finnemore (n 56) 69-88; See also Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 19-20; Charnovitz, ‘Two Centuries of Participation’ (n 145) 200-201.

Finnemore's theory also allows for exploring how NGOs came to hold certain normative views and the mechanisms enabling NGOs to teach their views to states.<sup>159</sup>

Contrary to systemic constructivism, unit-level constructivism as advocated by Peter Katzenstein offers domestic normative structures as explanations of variations in actors' identities, interests and actions.<sup>160</sup> Therefore, Katzenstein's theory is of particular relevance to Hypotheses 2<sup>161</sup> and 3.<sup>162</sup> According to Katzenstein, actors' interests and courses of action are flexible when norms of collective identity are uncontested. And *vice versa*, when norms of collective identity are contested, actors' interests and courses of action are in a stalemate.<sup>163</sup> An illustrating example of this is the Non-Aligned Movement (NAM) in the ICC negotiations. The Movement held rigid positions on a number of issues (actors' interests and courses of action in stalemate). Its influence on the ICC negotiations, however, was weakened due to historical enmities between the members of the group, preventing it from growing together (contested norms of collective identity).<sup>164</sup>

Taken together, Martha Finnemore's and Peter Katzenstein's theories create a holistic constructivist explanation of the factors influencing the process of defining war rape and forced marriage in times of armed conflict under the ICC. Holistic constructivism seeks to bridge the dichotomy between the international and the domestic domain reproduced by systemic and unit-level constructivism. It enables explanations of the development of normative structures of the present international system as well as the social identities they have created.<sup>165</sup>

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<sup>159</sup> Finnemore (n 56) 1-33.

<sup>160</sup> Katzenstein (n 56).

<sup>161</sup> Hypothesis 2 reads: States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage.

<sup>162</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

<sup>163</sup> Katzenstein (n 56) 14.

<sup>164</sup> Benedetti and Washburn (n 34).

<sup>165</sup> Reus-Smit, 'Constructivism' (n 146) 201.

### 2.3.2 A 'political' theory in a 'legal' thesis

Applying constructivist theories, which traditionally have their seeds in political science or international relations scholarship, may raise eyebrows in legal scholarship circles. For this thesis, however, using a 'political' theory in a 'legal' thesis is not considered a problem but rather enrichment. This research project takes an interdisciplinary approach to the criminalisation of war rape and forced marriage under the ICC instruments based on an understanding of law and politics as being interconnected and mutually shaping.<sup>166</sup> Law regulates state practice and, at the same time, is created through it.<sup>167</sup> Therefore, law is political, legalising current political, economic and social situations.<sup>168</sup> Law and legal institutions like the ICC give politics shape and content.<sup>169</sup> For example, the prohibition of sexualised crimes set out in the Rome Statute communicates to states that these kinds of acts are wrong and should not be tolerated. Therefore, law constrains politics. It teaches states what not to allow. However, when rules are indeterminate or situations arise that were not anticipated, law also serves as a discursive medium in which states make, address and assess legal claims.<sup>170</sup>

The ICC negotiations of rape and forced marriage are a good example.<sup>171</sup> At the time when the ICC negotiations began, rape had been categorised and defined in different ways. State and non-state actors used this indeterminate status to discuss their understandings of rape, eventually agreeing on a compromise definition. While war rape had been a well-established and well-theorised crime at the time of the ICC negotiations (albeit with varying classifications and definitions), forced marriage in times of armed conflict only just began to appear on the international agenda. The Women's Caucus took the opportunity offered by the negotiations of the Rome Statute and raised the issue in the context of the discussions of the crime of sexual slavery. The Caucus' aim was to achieve gender-sensitive legal recognition of the various experiences of women in war, resulting in an expanded list of sexualised crimes not limited to rape and forced prostitution. Its efforts

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<sup>166</sup> Reus-Smit, 'Introduction' (n 146) 6.

<sup>167</sup> James Crawford and Martti Koskeniemi, 'Introduction' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 2-6.

<sup>168</sup> Boyle and Chinkin (n 34) 24-25.

<sup>169</sup> Boyle and Chinkin (n 34) 1, 9; Reus-Smit, 'Introduction' (n 146) 1-6; Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press 2004) 25.

<sup>170</sup> Boyle and Chinkin (n 34) 1, 9; Reus-Smit, 'Introduction' (n 146) 1-6; Reus-Smit, 'The Politics of International Law' (n 169) 25.

<sup>171</sup> See Chapters 7-9 for a detailed discussion of the ICC negotiations of rape and forced marriage.

were met with strong opposition from a group of mainly Arab states who engaged in this particular aspect of the ICC negotiations to protect national marriage laws and practices from falling within the reach of crimes against humanity as well as from international interference.

“By broadening the concept of politics to include issues of identity and purpose as well as strategy, by treating rules, norms, and ideas as constitutive, not just constraining, and by stressing the importance of discourse, communication, and socialisation in framing human behaviour, constructivism offers [rich] resources for understanding the politics of international law”.<sup>172</sup>

“Constructivism, and its sophisticated understanding of norms, makes possible a sociologically-rich and historically-grounded understanding of [...] law.”<sup>173</sup> Constructivism is interesting for legal scholars as they are interested in conformity of action with rules<sup>174</sup> and constructivism provides arguments about why behaviour may be rule-driven. Law is prescriptive, whereas constructivism is descriptive and explanatory. Questions about why particular rules exist and not others, or why states do or do not comply with them are marginal to legal scholarship but central to constructivists. However, if laws are not based on informed understandings about actors’ identities, interests and actions as well as the normative structures that shaped them, laws will be dismissed as unrealistic or naive. By explaining why and how actions may be driven by normative structures, constructivist theories deal with issues that are foundational for law.<sup>175</sup>

#### *2.4 In place of a conclusion: Shortcomings of feminism and constructivism, and advantages of a combined theoretical approach*

Various criticisms are raised against feminists and feminist theories. Critics argue that feminists apply a top-down approach, only looking at the top of society and drawing conclusions about society as a whole. Along the same lines, feminists claim to represent all women while often focusing on actors and structures of the global North. Based on

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<sup>172</sup> Reus-Smit, ‘The Politics of International Law’ (n 169) 23; See also Brunnée and Toope (n 138) 1.

<sup>173</sup> Brunnée and Toope (n 138) 9.

<sup>174</sup> Reus-Smit, ‘Introduction’ (n 146) 1.

<sup>175</sup> Finnemore (n 56) 142-143.

essentialist understandings of sex/gender, feminism's critics argue that women and men are fundamentally different. Therefore, their different roles in society should be maintained and traditional values or religious beliefs resulting in inequality between women and men should be respected. Critics also claim that feminists further disharmony between women and men, even promote hatred or dislike of men and boys, and exaggerate patriarchy. Even though feminism is committed to gender equality, it is biased towards women and to elevate women's interests above men's. Feminism is pre-committed to making distinctions between *m* and *f* – men and women, male and female, masculine and feminine – where *f* is subordinate or disadvantaged to *m*. Feminism is pre-committed to side with *f*.<sup>176</sup> This priority for *m/f* and of siding with *f* results in a neglect to examine *m* and *f* without assuming a domination-subordination relationship that necessarily takes the form of *m>f*. Not every issue and every challenge can be attributed to *m/f* in the first place.<sup>177</sup>

Regarding constructivism, it is argued that it builds on an often unconscious positivist bias regarding International Law, focuses too little on the difference between social and legal norms, and is preoccupied with compliance issues. More generally, constructivism's state-centricity and its idea of the nature of social agency are criticised and debated.<sup>178</sup> It is suggested that mainstream constructivism ignores power structures like gender and patriarchy that prevent change. This leads to hierarchies and inequalities not being adequately addressed. Linked to this, the criticism is raised that the constructivist idea that actors and structures mutually constitute each other assumes equality of actors.<sup>179</sup>

Taken together, feminism and constructivism resolve some of their respective limitations. Feminism emphasises power structures in a constructivist analysis. Constructivism goes beyond feminism's focus on *m/f* and *m>f* and enables a gender-neutral approach.

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<sup>176</sup> Janet Halley, 'Take a Break from Feminism?' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004) 61.

<sup>177</sup> Barnett (n 87) 19-23; Halley, 'Take a Break from Feminism?' (n 176) 65-68, 166, 197; Smart (n 57) 162-185.

<sup>178</sup> Brunnée and Toope (n 138) 23-26.

<sup>179</sup> Brunnée and Toope (n 138); Kurki and Sinclair (n 56); Birgit Lochner and Elisabeth Prügl, 'Feminism and Constructivism: Worlds Apart or Sharing the Middle Ground?' (2001) 45 *International Studies Quarterly* 111.

Feminism and constructivism share the desire to challenge and rethink what is treated as given, including traditional power structures. Feminism and constructivism stress the importance, diversity and changeability of normative structures and actors. This highlights the importance of contexts and makes communication necessary. It also raises scepticism about absolutes and objective grand theories.

### **3 Research methods**

#### *3.1 Introduction*

After Chapter 2 outlined the theoretical underpinnings of this thesis, Chapter 3 discusses the methods used. First, Chapter 3 elaborates on the main preoccupations and limitations of qualitative research methods. Establishing a link to the theoretical basis of this thesis, the feminist research method of asking ‘the woman question’ is explained and illustrated, and a reflective excursus on the present researcher’s bias is included. Parts 3.5 and 3.6 contain a detailed discussion of the foundational literature and document analysis, and of the semi-structured interviews conducted for this research project. The methods of synthesis of research findings are covered before the chapter concludes with a reflection upon lessons learned.

#### *3.2 Qualitative research methods*

The decision which methods to use in this research project was mainly guided by practical considerations. Consistent with the research project’s objectives and questions, qualitative rather than quantitative research methods were used.<sup>180</sup> A better understanding of the ICC negotiations and how the definitions of war rape and forced marriage came about cannot be meaningfully created by numbers. A qualitative approach is necessary to answer the research questions stated in Chapter 1 as they focus on processes and aim to develop an understanding of actors’ identities, interests and actions in the context of the ICC negotiations. In addition to the research questions and hypotheses, the choice of research methods was also guided by feminist and constructivist theories. However, the present researcher also sought to remain flexible<sup>181</sup> so as not to mechanically impose a pre-determined format on the ICC negotiations and to limit the area of enquiry too much. In the interviews conducted for this thesis, flexibility allowed for genuinely revealing the perspectives of research participants<sup>182</sup> (interviewees) that might not have crossed the

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<sup>180</sup> Alan Bryman, *Social Research Methods* (4<sup>th</sup> edn, Oxford University Press 2012) 380, 399-404.

<sup>181</sup> *ibid.*

<sup>182</sup> Svend Brinkmann and Steinar Kvale, *Interviews: Learning the Craft of Qualitative Research Interviewing* (2<sup>nd</sup> edn, Sage 2009) 1-20, 53-56; Bryman (n 180) 380, 399-404; Marjorie L DeVault and Glenda Gross, ‘Feminist Qualitative Interviewing: Experience, Talk, and Knowledge’ in Sharlene Nagy Hesse-Biber (ed),

present researcher's mind before. To generate a better contextual understanding of events such as the ICC negotiations, qualitative research methods probe beneath surface appearances.<sup>183</sup> This is in accord with feminist and constructivist theories that aim to deconstruct what is taken for granted. Since feminist and constructivist theories understand experiences to be socially constructed and to vary over time and space, a flexible and context-sensitive research approach was necessary.<sup>184</sup> Qualitative research methods in general also place an emphasis on contexts as well as on processes. This demonstrates concern for how events or patterns unfold over time. A context- and process-sensitive research approach facilitates rich and multi-layered (thick) descriptions.<sup>185</sup> Linked to this is feminism's and constructivism's scepticism of absolutes, generalisations and objectivity. Consequently, feminists make cautious claims about the data constructed.<sup>186</sup>

While qualitative research methods are appropriate for this research project, their limitations have to be taken into account. Critics often assert that qualitative research is too subjective and findings rely upon personal relationships between the researcher and the research participants. This makes qualitative studies difficult to replicate.<sup>187</sup> Within the feminist and constructivist framework set out in Chapter 2 as well as below, however, subjectivity and even biases are generally considered unavoidable and acceptable as long as the researcher reflects on them and communicates them to the research participants.<sup>188</sup> In contrast to the objectivity that usually is expected from a researcher in the sense of impartiality, being unbiased and operating in as value-free a way as possible,<sup>189</sup> for example when conducting an interview, feminism and constructivism establish the

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*Handbook of Feminist Research* (Sage 2007); Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58).

<sup>183</sup> Bryman (n 180) 380, 399-404.

<sup>184</sup> Bartlett (n 120) 849-863; Jackson and Lacey (n 57) 789; Kurki and Sinclair (n 56).

<sup>185</sup> Bryman (n 180) 380, 399-404.

<sup>186</sup> Brinkmann and Kvale (n 182) 1-20, 53-56; Charlesworth, 'Feminist Methods in International Law' (n 58); Charlesworth, Chinkin and Wright (n 91) 613-645; Harding, 'Is there a Feminist Method?' (n 58); Hesse-Biber, 'Feminist Research' (n 58); Celia Kitzinger, 'Feminist Approaches' in Giampietro Gobo and others (eds), *Qualitative Research Practice* (Sage 2007) 114-118; Kralik and van Loon (n 58) 36; Landmann (n 58) 430-431.

<sup>187</sup> Bryman (n 180) 405-406.

<sup>188</sup> Brinkmann and Kvale (n 182) 85; Harding, 'Is there a Feminist Method?' (n 58); Kralik and van Loon (n 58) 37; Landmann (n 58) 431.

<sup>189</sup> The Association for Qualitative Research, 'Objectivity' <<http://www.aqr.org.uk/glossary/objectivity>> accessed 26 March 2015.



researcher as a real, authentic individual with concrete, specific interests that he or she conveys in the research process. Arising emotions are considered part of the research experience and should be taken into account. Consequently, the researcher is understood to affect the research process and outcomes.<sup>190</sup> Consequently, any findings are tentative as they are subjective and depend on the researcher's identity, interests and focus as well as on his or her construction, selection and interpretation of information.<sup>191</sup> This makes findings difficult to replicate and hence to verify.

As explained above, while it is criticised that findings resulting from qualitative research rely upon personal relationships between the researcher and the research participants, this is unproblematic according to feminist values that emphasise trusting relationships, mutual understanding and true dialogues.<sup>192</sup>

In addition to difficulties in replicating qualitative studies, qualitative findings are difficult to generalise due to the small number of research participants or cases (small n).<sup>193</sup> A certain degree of generalisability is nevertheless achieved in this research project through linkages established to, and comparisons drawn with, other researchers' work or other cases. In addition to questions of generalisability, another criticism raised in the context of studies involving a small number of research participants problematizes their validity. It is argued that small n studies are not representative and therefore misleading. This criticism, however, ignores that qualitative research involving a small number of participants often provides more intense accounts, considerable detail and more insights into a situation or event than studies involving larger samples. Particularly relevant for this thesis, small n studies allow for acquiring a better sense of an experience at an individual and subjective level.<sup>194</sup>

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<sup>190</sup> Bartlett (n 120) 863-867; Michael Bloor and Fiona Wood, *Keywords in Qualitative Methods: A Vocabulary of Research Concepts* (Sage 2006) 79; Harding, 'Is there a Feminist Method?' (n 58); Kitzinger (n 186); Landmann (n 58); Reinhartz (n 58) 18-45; Sotirios Sarantakos, *Social Research* (4th edn, Palgrave 2013).

<sup>191</sup> Bryman (n 180) 382-383; Christopher Harding, 'Anecdote, Vignette and Quantification: A Biographical Dilemma' Aberystwyth University, Department of Law and Criminology, Cartel Biographies project <<http://www.aber.ac.uk/en/law-criminology/research/researchclusters/global-commerce/cartel-collusion/anecdote/>> accessed 24 September 2014.

<sup>192</sup> DeVault and Gross (n 182); Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58); Reinhartz (n 58) 18-45; Sarantakos (n 190).

<sup>193</sup> Bryman (n 180) 405-406.

<sup>194</sup> Harding, 'Anecdote, Vignette and Quantification' (n 191).

### 3.3 Feminist research methods: Asking ‘the woman question’

Before discussing feminist research methods used in this thesis, it is important to note that the use of the label ‘feminist’

“can create an expectation of feminist originality or invention that feminists do not intend and cannot fulfil. [...] Still, labelling methods or practices or attitudes as feminist identifies them as a chosen part of a larger, critical agenda originating in the experiences of gender subordination. Although not every component of feminist practice and reform is unique, these components together address a set of concerns not reached by existing traditions.”<sup>195</sup>

Feminist research methods are “critical and constructive”<sup>196</sup> and aim to uncover aspects of an issue which more traditional methods tend to neglect or suppress.<sup>197</sup> Emanating from feminist politics, “feminist methods [...] find their justification [...] in their ability to advance substantive feminist goals.”<sup>198</sup> Feminist methods are not discrete but rather use “analytic and critical methods shared with, for example the sociology of law, Marxism or critical legal theory to illuminate sex/gender issues”.<sup>199</sup>

As discussed in Chapter 2, feminist legal theories show that women’s realities are shaped by male law, legal institutions and legal processes. Therefore, law produces, but is also a product of, realities that are different for women and men as well as for different women and men.<sup>200</sup> This assumption that some features of law are not only biased but also male is linked to asking ‘the woman question’. ‘The woman question’ asks about the gender implications of rules and social practices which may otherwise appear to be objective or neutral. It includes questions such as the following: Have women been considered? If not, in what way have they been left out? How could that be corrected? What difference would a correction make?<sup>201</sup> Asking ‘the woman question’ in law means

- asking how, where and why the law, legal institutions and legal processes fail women;

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<sup>195</sup> Bartlett (n 120) 833-834.

<sup>196</sup> Bartlett (n 120) 829.

<sup>197</sup> Bartlett (n 120) 836.

<sup>198</sup> Bartlett (n 120) 831.

<sup>199</sup> Jackson and Lacey (n 57) 789.

<sup>200</sup> Jackson and Lacey (n 57); Smart (n 57) 189-190.

<sup>201</sup> Bartlett (n 120) 837; Harding, ‘Is there a Feminist Method?’ (n 58).

- analysing the production of a system of rules;
- challenging assumptions, power structures and stereotypes;
- questioning who examines an issue, who makes a law and whom particular rules serve;
- scrutinising the definition of, and explanation for, an issue, the focus of an inquiry and which social conditions are reflected and impacted;
- uncovering silences; and
- examining possibilities for an empowering transformation of the law.<sup>202</sup>

Consequently,

“[a]sking the woman question reveals the ways in which political choice and institutional arrangements contribute to women’s subordination. Without the woman question, differences associated with women are taken for granted and, unexamined, may serve as a justification for laws that disadvantage women. The woman question reveals how the position of women reflects the organization of society rather than the inherent characteristics of women. As many feminists have pointed out, difference is located in relationships and social institutions [...] not in women themselves. In exposing the hidden effects of law that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.”<sup>203</sup>

In addition to asking ‘the woman question’ as a method to analyse the criminalisation of war rape and forced marriage under the ICC instruments, it can be argued that the substance of the thesis’ subject itself is asking ‘the woman question’. After all, as argued in Chapter 2, the thesis focuses on issues of gender within the making of International Law. However, from a constructivist perspective, this is unavoidable as methods do not only shape the substance of research,<sup>204</sup> but substance also shapes the research methods that are used.

As a general word of caution, when asking ‘the woman question’ it is crucial to keep in mind that women are not a homogenous group. As stressed in Chapter 2, women

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<sup>202</sup> Barnett (n 87) 93-119; Bartlett (n 120) 837-849; Binion (n 58) 510-513; Brinkmann and Kvale (n 182) 1-20, 53-56; Charlesworth, ‘Feminists Critiques of International Law and Their Critics’ (n 80); Charlesworth, ‘Feminist Methods in International Law’ (n 58); Charlesworth, Chinkin and Wright (n 91); Harding, ‘Is there a Feminist Method?’ (n 58); Hesse-Biber, ‘Feminist Research’ (n 58); Jackson and Lacey (n 57) 826; Kitzinger (n 186) 114-118; Kralik and van Loon (n 58) 36; Landmann (n 58) 430-431; Mertus and Goldberg (n 58) 220; Naffine (n 87) 73.

<sup>203</sup> Bartlett (n 120) 843.

<sup>204</sup> Bartlett (n 120) 844.

differ for example on the basis of nationality, race, culture, class, age, education, profession and sexual orientation.<sup>205</sup> Patriarchal culture essentialises women and establishes hierarchies based on the degree as to which women adhere to their patriarchal definition.<sup>206</sup>

### *3.4 The present researcher's biases*

As mentioned above, feminist and constructivist theories and methods acknowledge that a researcher's identity, interests and actions shape the research process and outcomes.<sup>207</sup> This requires including a reflection on the nature of the present researcher's biases and how they affected the research process, approaches, style, questions and outcomes.

The present researcher is a young, middle-class, white, Western-European, feminist woman. Her feminist values formed the foundation for the project. They played a role in selecting the subject of research, formulating research questions, choosing and using theories and methods of research as well as in the way data was analysed and interpreted. Therefore, the present researcher's feminist values also had an impact on the research outcomes. The formulation of research questions, data analysis and interpretation as well as the research outcomes were further influenced by the generally positive view the present researcher holds of NGOs, their specialised subject knowledge for example of sexualised war violence against women, and their ability to influence states' interests and actions. Shared with most research participants, the researcher's social, professional and geographic status provided the means, and facilitated access to, sources of information. Her professional background in the studies of politics shaped the way the research project was approached and carried out. The researcher's professional background as an academic more generally positively shaped her rapport with research participants. Her sex and gender, in contrast, sometimes proved challenging when matched by the interviewee. On one occasion, her identity as a young, Western-European female feminist led to unnecessary caution when speaking to an older, male Arab. Here, however, the shared

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<sup>205</sup> Bartlett (n 120) 843-835; Harding, 'Is there a Feminist Method?' (n 58).

<sup>206</sup> Bartlett (n 120) 843-835; Charlesworth and Chinkin (n 92) 40-42.

<sup>207</sup> Bloor and Wood (n 190) 79; Brinkmann and Kvale (n 182) 85; Harding, 'Is there a Feminist Method?' (n 58); Kitzinger (n 186); Landmann (n 58) 431; Reinhartz (n 58) 18-45; Sarantakos (n 190).

social and professional status was perceived by the researcher to build bridges. The research style in general was more influenced by the researcher's very organised, friendly, open, respectful, non-pretentious and non-judgmental personality. This enabled her to follow the pace of the interview.<sup>208</sup>

### *3.5 Critical analysis of existing literature and relevant documents*

This thesis employed a critical analysis of existing literature and relevant documents related to the ICC negotiations of war rape and forced marriage as the foundational research method. The aim was to draw conclusions about the factors that influenced the definition of war rape and forced marriage. A document analysis is a necessary part of every research project and was of significance here as this research project not only analyses secondary literature but also primary sources. Furthermore, a document analysis is an important research tool in its own right and an invaluable part of most triangulation.<sup>209</sup>

The documents analysed for this thesis were mainly documents available in the public domain. On a number of occasions, authors and organisations were contacted to provide documents that were not publicly available. The documents analysed included official documents deriving from state and private sources, mass media and virtual outputs as well as secondary literature.<sup>210</sup> Examples are conventions and statutes, UN documents, other legal documents as well as case reports of national and international courts. Furthermore, books, chapters in edited books, journal articles, (research) reports and working papers mainly from the fields of International Law, International Politics and Gender Studies were examined. ICC advocacy papers, commentaries, recommendations, reports and working papers were also analysed. In addition, conference presentations and papers, (online) newspaper and magazine articles, radio broadcasts and blog entries were studied. Together, these sources are considered to establish a comprehensive record of the ICC negotiations.

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<sup>208</sup> Brinkmann and Kvale (n 182) 27; Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58) 133.

<sup>209</sup> Bloor and Wood (n 190) 170: Triangulation is "systematic comparison of research findings on the same research topic generated by different research methods".

<sup>210</sup> Bryman (n 180) 543-554; 586-587.

Secondary literature was found through library-based and online searches. Based on the context created by secondary literature, primary sources were found through online searches using the ICC Legal Tools database, UN databases such as the Official Document System of the United Nations and the United Nations Dag Hammarskjöld Library, the CICC website and the websites of relevant international courts and tribunals as well as through using the Google search engine. The research project profited from the existence and easy availability of documents. It has to be kept in mind, however, that library and online searches provide only partial and limited access to information in the sense that library catalogues do not include every book possible and not all documents may be available in the public domain and therefore in a database.<sup>211</sup> To access as many documents as possible, various libraries and databases were used for this research project. Although Google was the only search engine used, searches in different languages and the use of different key words provided access to a wider part of the web. Nevertheless, working with the official record of the ICC negotiations proved to be a challenge. The official record of the ICC negotiations includes lists of delegates who participated in different meetings.<sup>212</sup> However, those lists are not available for all meetings, not even all official ones. They are incomplete in the sense that they focus on state delegations and do not record the participation of non-state actors. Therefore, finding out which NGOs participated and who was part of their delegation was virtually impossible. This proved challenging when sampling for interviews. Just as the official record does not include lists of delegates for all meetings, it also does not include crucial records of informal meetings and of drafting work. The documents that are available record outcomes but seldom give enough information to trace how the outcomes came about. They seldom indicate what influenced a state's proposal. These challenges were met by conducting research interviews.

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<sup>211</sup> Bryman (n 180) 655.

<sup>212</sup> PrepCom 'List of Delegations' (09 May 1996) UN Doc A/AC.249/INF/1/Add.1; PrepCom 'List of Delegations' (29 August 1996) UN Doc A/AC.249/INF/2; PrepCom 'List of Delegations' (13 March 1997) UN Doc A/AC.249/INF/3; PrepCom 'List of Delegations' (27 May 1998) UN Doc A/AC.249/INF/4; PrepCom 'List of Delegations, Addendum' (21 June 1996) UN Doc A/AC.249/INF/1/Add.2; PrepCom 'List of Delegations, Addendum' (14 October 1996) UN Doc A/AC.249/INF/2/Add.1; PrepCom 'List of Delegations, Addendum' (23 April 1997) UN Doc A/AC.249/INF/3/Add.1; PrepCom 'List of Delegations, Corrigendum' (29 June 1998) UN Doc A/AC.249/INF/4/Corr.1; PrepCom2 'List of Delegations' (12 March 1999) UN Doc PCNICC/1999/INF.1; PrepCom2 'List of Delegations, Addendum' (07 April 1999) UN Doc PCNICC/1999/INF.1/Add.1.

In general, the documents used in this research project were deemed authentic, credible and meaningful.<sup>213</sup> They were regarded to be reliable, clear and comprehensible and would not have been used if they were not. A large majority of documents is of unquestioned authorship. Comparisons were established between information constructed from different documents as well as between information constructed from documents and in interviews to ensure their credibility. This way, erroneous or distorted information was balanced.

The documents were analysed thematically as well as theoretically. This is discussed further in part 3.7 below. In addition, documents informing Chapters 8 and 9 were analysed hermeneutically, seeking to bring out the meanings of texts from the perspective of its authors.<sup>214</sup> Moreover, the importance of analysing documents in their historic context became apparent especially in relation to the legislative histories of war rape and forced marriage and their relationship to, and impact on, the ICC negotiations.<sup>215</sup>

### 3.6 Interviews

When the document analysis reached theoretical saturation, many research questions could still not be answered to the satisfaction of the present researcher. Therefore the critical document analysis was supplemented with interviews aimed at gaining a better understanding of the dynamics of the ICC negotiations, the main actors, their positions on sexualised violence, particularly war rape and forced marriage, and how these developed. In a way, this made the interviews comparable to narrative interviews.<sup>216</sup> However, as the interview also aimed at uncovering the interviewees' taken-for-granted assumptions and therefore explored conceptual understandings of terms like 'forced marriage' and how

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<sup>213</sup> Bryman (n 180) 544.

<sup>214</sup> Bryman (n 180) 560-561.

<sup>215</sup> For more information see Chapters 4 and 5.

<sup>216</sup> Brinkmann and Kvale (n 182) 155; Catherine Kohler Riessman, 'Narrative Interviewing' in Victor Jupp (ed), *The SAGE Dictionary of Social Research Methods* (Sage 2006) <<http://srmo.sagepub.com/view/the-sage-dictionary-of-social-research-methods/n125.xml>> accessed 01 June 2015: Narrative interviews are a form of interviews that involve the telling of detailed stories of experiences, not generalised descriptions. A focus is placed on who the hero, antagonist and helper are. In narrative interviews, the interviewer tries to ascertain the main plot and sub-plots as well as elements of tension and conflict, and their resolution.

these were positioned in relation, and linked to, other concepts, the interviews can also be characterised as conceptual interviews.<sup>217</sup>

As the interviews can be described as an “interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences”,<sup>218</sup> they fit in with feminist consciousness-raising. In consciousness-raising, all participants are established as real, authentic individuals with their own personal experiences which shape, and are shaped by, theory.<sup>219</sup> “The interplay between experience and theory ‘reveals the social dimension of individual experience and the individual dimension of the social experience’ and hence the political nature of personal experience.”<sup>220</sup> Consciousness-raising values non-hierarchical relationships, reciprocity, empathy, active listening and engaging as well as being open and paying attention to subtleties.<sup>221</sup> However, especially the researcher’s self-disclosure creates the risk of being stereotyped and increasingly vulnerable to criticism.<sup>222</sup> Based on the researcher’s values, research participants may second-guess their answers in an interview.<sup>223</sup> Furthermore, if the researcher’s views are not shared or present a challenge to research participants, the question arises if feminist researchers should prioritise an interviewee-centred approach or stay true to their politics. This dilemma raises the question of how far the commitment of seeing through the eyes of the research participant can and should be stretched.<sup>224</sup> Such a situation arose in this research when the present researcher spoke to a member of the Arab block. However, different views did not create tension as the researcher was aware of personal biases and of the possibility that a challenging situation could arise. Continuing positive rapport between the researcher and the interviewee was facilitated by the aim of the interviewer to understand rather than to judge the Arab block’s positions in the ICC

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<sup>217</sup> Brinkmann and Kvale (n 182) 151: Conceptual interviews are a method to “explore the meaning and the conceptual dimensions of central terms, as well as their positions and links within a conceptual network.” Here, the interviewer’s questions asked for concrete descriptions.

<sup>218</sup> Bartlett (n 120) 863-864.

<sup>219</sup> Bartlett (n 120) 863-867; Bloor and Wood (n 190) 79; Harding, ‘Is there a Feminist Method?’ (n 58); Kitzinger (n 186); Landmann (n 58); Reinhartz (n 58) 18-45; Sarantakos (n 190).

<sup>220</sup> Bartlett (n 120) 864.

<sup>221</sup> Bryman (n 180) 491-492; Kitzinger (n 186) 114, 116; Kralik and van Loon (n 58) 38; Landmann (n 58) 430-431; Reinhartz (n 58) 18-29.

<sup>222</sup> Bartlett (n 120) 857: Risk-taking and vulnerability, however, are valued over caution and detachment in consciousness-raising.

<sup>223</sup> Reinhartz (n 58) 33.

<sup>224</sup> Bryman (n 180) 492; Landmann (n 58) 431.



negotiations. For less favourable situations, it is suggested to remain non-judgmental while sensitively and reasonably challenging patriarchal attitudes.

Research participants were sampled applying a generic purpose sampling approach. This approach is relatively open-ended. Emphasising the generation of concepts and contextual understanding, it increased the prospect that research participants would have something of relevance to say about the research questions central to this thesis.<sup>225</sup> In sampling members of various state and non-state delegations that participated in the ICC negotiations, a great deal of variety in the resulting sample was ensured. Consequently, different points of view were heard and considered. A sequential approach to purposive sampling ensured the necessary flexibility to add to the initial sample as benefited the research questions and expected answers. This indicates that this thesis employed a combination of critical case sampling and snowball sampling. Using critical case sampling, research participants were chosen because it was expected that they would allow a hypothesis to be tested.<sup>226</sup> For example, interviews with members of the CICC were conducted to test Hypothesis 1 that NGOs played a role in the ICC negotiations. As the research questions remained the same throughout the research process, an *a priori* sampling approach was used where the criteria for selecting participants were established at the outset.<sup>227</sup> The delegations included in the sample were determined based on preliminary research on the main actors in the ICC negotiations, especially in relation to sexualised violence, particularly war rape and forced marriage. Nevertheless, the sample itself grew as research participants proposed other participants who could contribute to the research project (snowball sampling).<sup>228</sup> Snowball sampling also limited the negative effects of the availability of only incomplete information about the actors who participated in the ICC negotiations.

This sampling approach required the researcher to have a clear idea of the research project's goals. The fact that research participants were sampled according to these goals can be perceived as limiting for the research findings. For this research project, however, it was considered to be a focused and efficient approach. It is also criticised that the sampling

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<sup>225</sup> Bryman (n 180) 418, 422-423.

<sup>226</sup> Bryman (n 180) 418-419.

<sup>227</sup> Bryman (n 180) 418.

<sup>228</sup> Bryman (n 180) 418, 424.

approach taken here does not allow the researcher to generalise to a population.<sup>229</sup> However, as mentioned in Chapter 1, this is also not the aim of this thesis.

As the research participants were members of various state and non-state delegations that participated in the ICC negotiations, the concept of elite interviews<sup>230</sup> would have become relevant to the methods applied in this thesis had a different theoretical and methods framework been used. A feminist frame, however, renders the concept redundant. As mentioned above, it stresses non-hierarchical relationships<sup>231</sup> and understands interviews as an interviewee-orientated but reciprocal process where the research participant as well as the researcher are considered knowledgeable and offer information. This makes them co-constructors of meaning independent of their background.<sup>232</sup> Feminist research methods emphasise trusting relationships, mutual understanding and true dialogues.<sup>233</sup> Contrary to this, understanding interview situations within an elite frame may create mistrust of the research participants – politicians and lobbyists – by the researcher. In addition, an elite frame would have created and perpetuated a dualism contested by feminists. Interviewees would have been constructed as

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<sup>229</sup> Bryman (n 180) 418.

<sup>230</sup> Brinkmann and Kvale (n 182) 147.

Warwick E Murray, Regina Scheyvens and Henry Scheyvens, 'Working with Marginalised, Vulnerable or Privileged Groups' in Regina Scheyvens and Donovan Storey (eds), *Development Fieldwork: A Practical Guide* (Sage 2003) 182-186; David Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16 *Politics* 199; Katherine E Smith, 'Problematising Power Relations in "Elite" Interviews' (2006) 37 *Geoforum* 643, 644-645: Elites are groups of individuals that hold privileged positions in society. Interviews with political elites are conducted to provide insights into the mind-set of actors who have played an active role in shaping the society we live in. Comparable to interviews in general, elite interviews aim to create a better understanding of the interviewee's political position, perceptions, values and ideology as well as his/her subjective analysis of a particular event. They can help understand what drives elites and give researchers a better idea of the context and atmosphere of an event. Especially when gaining access to authors of documents or reports, researchers potentially gain an understanding of these documents or reports as they are intended to be understood by the author. Elite interviews can provide a basis for the interpretation of personalities of actors involved in decision-making and help explain the outcome of events. They provide first-hand accounts and information that was not recorded. In addition to these potential benefits, challenges in regard to elite interviews are problems of access. Some elites consist of more obscure, informal networks that are difficult to sample and contact. Access is further complicated due to the busy schedule of individuals. Elites are also better trained for interview situations and public speaking than a possibly deferential interviewer.

<sup>231</sup> DeVault and Gross (n 182); Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58); Kitzinger (n 186) 114, 116; Kralik and van Loon (n 58) 38; Landmann (n 58) 430-431; Reinhartz (n 58) 18-45; Sarantakos (n 190).

<sup>232</sup> Kitzinger (n 186) 114, 116; Kralik and van Loon (n 58) 38; Landmann (n 58) 430-431; Reinhartz (n 58) 18-21.

<sup>233</sup> Bryman (n 180) 491-492; DeVault and Gross (n 182); Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58); Kitzinger (n 186) 114, 116; Kralik and van Loon (n 58) 38; Landmann (n 58) 430-431; Reinhartz (n 58) 18-45; Sarantakos (n 190).

powerful knowers, as privileged, influential experts while the interviewer would have been viewed as a powerless footman.<sup>234</sup> Following a poststructuralist view of power, however, power is a diffuse, fluid and mobile concept rather than an inscribed capacity. It is exercised rather than appropriated by particular individuals or groups. Power is exercised in a variety of modalities and therefore is negotiable. In this context, the constructivist view that elites do not only make decisions that affect others but are also affected by decisions made by others<sup>235</sup> becomes relevant. However, it has to be considered that the feminist emphasis on reciprocal, equal relationships between the researcher and the research participant could also hide actually existing power differences.<sup>236</sup>

Modern technology and the use of email and social networks greatly facilitated access to potential research participants. The overall response rate to initial enquiries was high. Eventually, the sample consisted of sixteen research participants who were involved in the ICC negotiations and eventually were available for an interview. Based on the purpose of this thesis, this number was judged big enough to ensure meaningful contributions to the understanding of the ICC negotiations, especially of the main actors and their positions in relation to the crimes of war rape and forced marriage in times of armed conflict. At the same time, it was small enough to undertake a deep, case-orientated analysis.<sup>237</sup>

In the initial email sent to potential interviewees, they were informed about the purpose of the interview and the research project as well as the way in which the interview would be conducted. A list of general themes that would be discussed was included to give further information about the topic of the interviews. Including a list of general themes rather than of questions aimed at preventing the research participants from fully preparing and adjusting their answers beforehand. The list of themes, however, was considered precise enough to allow the interviewees to generally prepare for the interview and refresh their memories. Attached to this initial email were two letters of support from the present researcher's supervisors setting out her status and lending legitimacy and credibility to her

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<sup>234</sup> Murray, Scheyvens and Scheyvens (n 230); Richards (n 230).

<sup>235</sup> Smith (n 230) 644-645.

<sup>236</sup> Brinkmann and Kvale (n 182) 147; Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58) 128.

<sup>237</sup> Bryman (n 180) 424.

work and interview request. After the researcher received initial agreement of research participants to take part in an interview, informed consent forms were emailed to them. These included information on confidentiality, anonymity, the right to withdraw and the researcher's right to publish data constructed in the interviews. As arrangements regarding confidentiality and anonymity were respected, no negative consequences for the interviewees were expected.

For reasons of access as well as efficiency and effectiveness regarding time and costs, the interviews were carried out via Skype or telephone. However, this is not considered to have resulted in any disadvantages in terms of outcomes. Following feminist research methods, the fact that both the researcher and the research participants remained in familiar environments can even be understood as an advantage as it influenced the situational and spatial power dynamics of the interview situation, facilitating equality.<sup>238</sup> Also stressing context naturalness, another critique raised against Skype or telephone interviews is that responses in face-to-face interviews are more accurate because the researcher and research participant have a 'normal' conversation.<sup>239</sup> This view, however, is deemed outdated since video and telephone calls are a frequently used part of modern communication. Additionally, evidence suggests that little difference exists in the kinds of responses researchers get when asking questions in person or on the phone.<sup>240</sup> This counters arguments that face-to-face interviews would be more fruitful than telephone interviews. The critique that it is not possible to observe participants' body language in telephone interviews can be and was addressed through Skype's video call function. However, plain telephone interviews were perceived as the most fruitful ones as the researcher and interviewee could fully concentrate on the substance of the conversation without being distracted by physical appearances.

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<sup>238</sup> Brinkmann and Kvale (n 182) 147; Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58) 128.

<sup>239</sup> Roger W Shuy, 'In-Person Versus Telephone Interviewing' in Jaber F Gubrium and James A Holstein (eds), *Handbook of Interview Research: Context and Method* (Sage 2001) 541.

<sup>240</sup> See Paul Drew, Annie Irvine and Roy Sainsbury, 'Mode Effects in Qualitative Interviews: A Comparison of Semi-Structured Face-to-Face and Telephone Interviews Using Conversation Analysis' (2010) Social Policy Research Unit, University of York <<http://www.york.ac.uk/inst/spru/research/pdf/modeEffects.pdf>> accessed 06 May 2015; Judith E Sturges and Kathleen J Hanrahan, 'Comparing Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4 *Qualitative Research* 107, 107-118.

Before the interviews began, the interviewees were briefed again as to the purpose of the interviews since some time could have passed between the initial email contact and the interview itself. In the verbal briefing as well as in the verbal and written debriefing, participants were also asked if they had any questions or (further) comments. This aimed at balancing the forms of engagement. It conveyed an additional sense of interviewee-orientation. More practically, it also aimed at preventing misunderstandings and to ensure the research participant did not feel that any relevant points remained unsaid. Some of the main points the researcher learned from an interview were fed back to the interviewee. This conveyed a sense of relevance of what was said for the research project. Additionally, feeding back the main points prepared the researcher and research participant for follow-up questions.

The interviews themselves were semi-structured. This open-ended and discursive format was chosen so as to allow for flexibility on the side of the researcher and the research participants as well as to facilitate the process of developing and refining hypotheses. Semi-structured interviews are guided by a list of questions or topics to be covered.<sup>241</sup> However, in most cases in this research, the questions were not followed in the way outlined in the interview guide and questions were added spontaneously, depending on the situation. For example, if relevant, lines of thought identified by earlier research participants were taken up and presented to later ones. Interviewees were also invited to raise additional or complementary issues to those brought up by the interviewer. As mentioned above, this facilitated an appreciation of what interviewees saw as relevant for the research area.

In addition to lines of thought identified by earlier interviewees, the questions asked in the interviews were also based on the initial research questions stated in Chapter 1, existing literature and document-based research on the ICC negotiations carried out previously as well as on discussions with the present researcher's colleagues. The questions mainly asked about values, behaviours, opinions, formal and informal roles, as well as about relationships. In accordance with the semi-structured format of the interviews, most questions varied from interviewee to interviewee, based on the person's background, to which delegation they belonged, the nature and position of this delegation

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<sup>241</sup> Bryman (n 180) 471.

in the ICC negotiations, and the issues with which it engaged. In general, the questions constructed the thematic structure of the interviews.<sup>242</sup>

The interview questions were formulated indefinitely so as to keep alternative lines of enquiry open. However, to prevent interviewees from avoiding unfamiliar or sensitive topics that were important for the research, follow-up questions, probing questions, specifying questions, direct questions and interpreting questions were asked.<sup>243</sup> Being explorative,<sup>244</sup> every interview began with introducing questions<sup>245</sup> about how the research participant became involved in the ICC negotiations and his/her (delegation's) roles, positions and strategies. The rest of the interview questions were a varied combination of:

- Follow-up questions to get the interviewee to elaborate on something he/she said, for example: "Could you expand on that?";
- Probing questions directly following up on something that had been said, for example: "Do you have other examples of this?";
- Specifying questions, for example: "Could you give me an example of how you engaged with the Women's Caucus?"
- Direct and indirect questions, for example: "Do you think forced marriage would have been understood differently if the ICC negotiations would have taken place today?", "Did you get a sense that certain states led this effort?"
- Structuring questions, for example: "I would like to move on to something we have not discussed yet.";
- Interpreting questions, for example: "Do you mean that the concept of human dignity underlies those of personal autonomy and integrity?"
- Silence, giving time to reflect.

Most questions were linked to information about and/or proposals submitted by the delegation in question during the ICC negotiations to demonstrate the researcher's knowledge and preparation as well as to make the question relevant to the research participant.

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<sup>242</sup> Bryman (n 180) 472-473.

<sup>243</sup> Brinkmann and Kvale (n 182) 135-137.

<sup>244</sup> Brinkmann and Kvale (n 182) 106.

<sup>245</sup> Brinkmann and Kvale (n 182) 135-137; Bryman (n 180) 476-478; Beth L Leech, 'Asking Questions: Techniques for Semistructured Interviews' (2002) 35 PS Online 665, 667-668.

With the consent of the research participants, every interview was digitally recorded. To prevent loss of data in case of technical problems, notes were taken in the course of every interview. These were completed extensively when reviewing the interview recordings. Taking notes during the interviews also facilitated being responsive and flexible in asking follow-up questions. It allowed for an initial interpretation and analysis of the data simultaneously with its construction.

As the interviews were not concerned with the way things were said but rather with what was said, they were not transcribed. This decision was further motivated by a view of transcriptions as different sources than the original interview recordings since an interpretation would have slipped in. Although it is possible to record non-verbal communication in transcriptions, gestures, facial expressions, tone of voice and pauses would have been likely to be neglected here. On a more practical note, the extensive notes taken during and after the interview were considered to serve the same purpose as transcriptions in terms of becoming familiar with what was said and conducting an initial analysis of the interviews.

Based on the extensive notes and original interview recordings, the interviews were analysed thematically as well as theoretically.<sup>246</sup> This way, a sound understanding of the data was obtained. The constructed data was judged to be reliable. Following feminist research methods, the researcher relied on the authority of the interviewees' experiences and understood reality to be what the research participants perceived it to be.<sup>247</sup> This is not to say that it was taken at face value without critically triangulating it with other data from different sources of information. Taking into account that the ICC negotiations took place ten to twenty years ago, biases due to memory lapses and distortion were allowed for. This follows a constructivist point of view according to which memory is a social construct that changes over time. Therefore, judged by the trustworthiness of the interviewees' reports<sup>248</sup> and their credibility based on triangulation and a thorough data analysis, the constructed data was considered to be valid, sound and worth depending on.<sup>249</sup> The interviews investigated what they intended to investigate.

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<sup>246</sup> For further discussion see part 3.7.

<sup>247</sup> Hesse-Biber, 'The Practice of Feminist In-Depth Interviewing' (n 58) 119; Reinhartz (n 58) 21.

<sup>248</sup> Brinkmann and Kvale (n 182) 249; Bryman (n 180) 390-391.

<sup>249</sup> Brinkmann and Kvale (n 182) 304-305.

In terms of a thematic evaluation<sup>250</sup> of the interviews, it can be concluded that the interviews contributed to the researcher's knowledge and understanding of the ICC negotiations. They provided first-hand accounts and information that was not on record before. The interviews helped to understand the context and established the atmosphere of the negotiations. They also contributed towards a better understanding of what drove the actors who participated in the negotiations. Speaking to some of the authors of crucial proposals facilitated a more thorough interpretation thereof. Therefore, the results of the interviews were considered worthwhile, valuable, insightful and beneficial.<sup>251</sup>

In terms of a dynamic evaluation, the interaction between the researcher and interviewees was good and the atmosphere friendly, open, supportive and inspiring. Interviewees replied to the questions posed in an expansive, detailed and considered fashion. Indicated by the use of the personal pronoun 'we' or phrases like 'in my opinion', they gave private and/or public accounts<sup>252</sup> of the ICC negotiations. While public accounts affirmed and reproduced a certain order, private accounts went beyond official party lines and conveyed personal views. The researcher was aware that the interviewees' accounts of the ICC negotiations were snapshots rather than the full story. They were accounts drawn from individual and personal experience and might have been presented in a way to impress. This meant they had to be interpreted with care. It also meant, however, that the accounts provided strong impressions of characters, ideas and objects, and allowed themes to be drawn from their telling. They promoted awareness and understanding of a situation and therefore had an educational force.<sup>253</sup> In most interviews, the conversation between the researcher and research participant was on equal footing. The conversation was regarded by the researcher as a reciprocal co-construction of meaning in the sense that both interviewer and interviewees shared relevant knowledge and influenced each other in what information was shared and where a focus was placed.<sup>254</sup> Therefore, despite the impression that most interviewees were used to giving interviews and to speaking in public, the interviews were not perceived by the researcher as elite interviews. On the contrary: the research participants' experience in public speaking was considered to contribute to the

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<sup>250</sup> Bryman (n 180) 395.

<sup>251</sup> Brinkmann and Kvale (n 182) 304-305.

<sup>252</sup> Bloor and Wood (n 190) 139-142.

<sup>253</sup> Harding, 'Anecdote, Vignette and Quantification' (n 191).

<sup>254</sup> Kitzinger (n 186) 114, 116; Kralik and van Loon (n 58) 38; Landmann (n 58) 430-431; Reinhartz (n 58) 18-21.



clearness of articulation as well as to the consistency of their accounts. One or two interviewees suggested that some of the answers could be found in the literature. In some situations, the interviewees became vague and evasive when they could not answer a question directly, and defensive when a critical follow-up question was asked. Some research participants asked for a list of questions to be sent prior to the interview. Therefore, they had and used the opportunity to prepare their responses. This occasionally limited the spontaneity of the interviewer and reduced interaction between the interviewee and the interviewer. Overall, however, the interviews where questions were sent to the research participant beforehand were not viewed as less informative as the ones where only general topics were shared with the interviewee prior to the interview. In general the researcher's outsider status in terms of experience and age as well as in most cases profession and gender was not regarded by the researcher to have had a negative impact on the interview process and outcomes. The shared status of gender proved challenging as some female interviewees were on occasion patronising and defensive when challenged. The shared status of profession in contrast proved beneficial in that the interviews with fellow academics who had participated in the ICC negotiations were perceived by the present researcher to be the most fruitful since the interviewees did not only have an understanding of the subject matter, but also of the research process.

Evaluating the potential impact of the knowledge and understanding gained from the interviews, it could provide practitioner-readers (for example actors involved in international law-making) with an occasion to reflect on their own practices and potentially spur change. Especially the more substantive discussions could be used in actors' advocacy to influence international law-making regarding sexualised crimes. However, it has to be noted that the researcher makes no claim to superior knowledge and simply wishes to contribute towards an understanding of the factors that influenced the definition of war rape and forced marriage in the ICC instruments.<sup>255</sup>

Reflecting on possible points of critique of interviews as a method of research, feminist and constructivist theories and methods render many of these points irrelevant. As with qualitative research methods in general, it could be argued that interview-based findings are difficult to replicate as the whole interview process is subjective rather than objective. Following feminist and constructivist understandings, however, this is

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<sup>255</sup> Bloor and Wood (n 190) 176-179.

inevitable, even desirable,<sup>256</sup> and unavoidably makes findings difficult to replicate. Subjectivity is balanced by a theory-led interpretation of research findings. These are generalisable to a certain extent as they are compared with, and linked to, other researchers' work or other cases.<sup>257</sup>

### 3.7 Synthesis of research findings

The methods used to synthesise research findings were based on the approaches used in primary research. In a way, research findings were analysed and synthesised in a pragmatic and eclectic way as bricolage;<sup>258</sup> generating meaning through *ad hoc* techniques. Research findings were analysed and synthesised thematically as well as theoretically. The themes employed for the thematic synthesis related to the research questions and hypotheses. Examples are 'the role of NGOs' or 'the relevance of national norms and rules'. Feminist and constructivist theories formed the base of the theoretical synthesis of research findings. The risk of noticing only those aspects that can be seen through these theoretical lenses was countered by staying open to alternative interpretations.<sup>259</sup> Research findings were summarised both under thematic and theoretical headings. This allowed for the identification of prominent sub-themes as well as comparing and contrasting research findings and establishing connections between them. This way, it was determined how research findings from different sources of information related to each other. Narratives which went beyond individual accounts were identified and used to produce new interpretations of the process of defining war rape and forced marriage under the ICC.<sup>260</sup>

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<sup>256</sup> Bartlett (n 120) 863-867; Bloor and Wood (n 190) 79; Harding, 'Anecdote, Vignette and Quantification' (n 191); Harding, 'Is there a Feminist Method?' (n 58); Kitinger (n 186); Landmann (n 58); Reinhartz (n 58) 18-45; Sarantakos (n 190).

<sup>257</sup> Brinkmann and Kvale (n 182) 168-171.

<sup>258</sup> Steinar Kvale, *Doing Interviews* (Sage 2007) 115: In the context of research interview analysis, "[b]ricolage refers to mixed technical discourses where the interpreter moves freely between different analytic techniques."

<sup>259</sup> Brinkmann and Kvale (n 182) 235-239.

<sup>260</sup> Brinkmann and Kvale (n 182) 234; Centre for Reviews and Dissemination, 'Incorporating Qualitative Evidence in or alongside Effectiveness Reviews' in Centre for Reviews and Dissemination (eds), *Systematic Reviews: CRD's Guidance for Undertaking Reviews in Health Care* (January 2009) <[https://www.york.ac.uk/crd/SysRev/!SSL!/WebHelp/6\\_5\\_SYNTHESIS\\_OF\\_QUALITATIVE\\_RESEARC H.htm](https://www.york.ac.uk/crd/SysRev/!SSL!/WebHelp/6_5_SYNTHESIS_OF_QUALITATIVE_RESEARC H.htm)> accessed 02 June 2015.

### *3.8 In place of a conclusion: Lessons learned*

In place of a conclusion stands a reflection on lessons learned from employing the research methods outlined in this chapter. A focus lies on interviews as they have largely been a new experience for the present researcher.

Throughout the process of conducting interviews, the researcher was concerned not to ask leading questions. This prevented her from asking more direct questions which could have led to more direct answers. After having conducted a small number of interviews, the researcher changed her interview guide and noted down cues and more comprehensive and less detailed questions in preparation for the interviews. Increasingly, she found herself having to rely less on the interview guide. She became more confident in asking instinctive follow-up questions. After getting a feeling for how many questions could be asked in one interview, she also established a list of priorities beforehand to know which questions to ask when time was limited. In relation to the interview preparation in general, the researcher developed a feeling for what kind of, and how much, preparation was necessary. One feature that remained a challenge throughout was to completely change the topic of a conversation. Often, the desire for consistency and a well-flowing discussion took priority. Even though this prevented a discussion of a broader range of topics, it often led to in-depth conversations about specific aspects of the ICC negotiations. Different topics were then raised in the follow-up emails.

## **4 The pre-ICC legislative histories of war rape and forced marriage**

### *4.1 Introduction*

After Chapters 2 and 3 set out the theoretical and methods framework for this thesis, Chapters 4 and 5 provide the thematic context for the analysis of the ICC negotiations of the definitions of war rape and forced marriage in times of armed conflict. Chapters 4 and 5 situate the ICC negotiations within the broader context of legal discussions and developments regarding war rape and forced marriage and retrace the legislative histories of the two crimes. They discuss the background against which the actors in the ICC negotiations debated the definitions of the two crimes. Chapters 4 and 5 also form the background against which the present researcher assesses these definitions. The aim of Chapters 4 and 5 is also to generate a common understanding of the nature and definitions as well as the causes and meanings of war rape and forced marriage in times of armed conflict for the purpose of this thesis.

Chapter 4 focuses on the pre-ICC legislative histories of war rape and forced marriage. It analyses and assesses the understanding of the two crimes that existed at the time of the ICC negotiations. It outlines the context based on which war rape and forced marriage were negotiated in New York and Rome. Chapter 4 addresses Research Questions 2 and 3 in that it studies the international and national normative structures that influenced the driving actors and their understanding of war rape and forced marriage in the ICC negotiations.

Chapter 5 focuses on discussions and legal developments regarding war rape and forced marriage that took place after the negotiations of the Rome Statute and the Elements of Crimes had been completed. It also discusses more theoretical considerations regarding the causes and meanings of the two crimes. Chapter 5 explores the current understanding of war rape and forced marriage. Considering the influence that the ICTY and ICTR jurisprudence had on the ICC negotiations in the 1990s, later cases of the Yugoslavia Tribunal and the SCSL may have an impact on future reviews of the ICC instruments. Therefore it is valuable to analyse here.

Chapter 4 first focuses on the legislative history of war rape and then on that of forced marriage. In relation to war rape, this chapter analyses early bilateral and multilateral conventions, the attempt to establish an international criminal tribunal after the First World War, the fourth Geneva Convention, international military tribunals

established after the Second World War, international agreements and documents from the period of the mid-1970s until mid-1990s, the ICTY and ICTR and their jurisprudence prior to the conclusion of the ICC Elements of Crimes as well as relevant national definitions of rape. In the absence of a similarly extensive legislative history of forced marriage, its increasing recognition as a crime in the second half of the 20<sup>th</sup> century is discussed. The definitions of war rape and forced marriage analysed and assessed in this chapter were referred to in the ICC negotiations of the definitions of the two crimes. Other definitions were added to provide a balanced and wider overview of the legal discussions and developments regarding the criminalisation of war rape and forced marriage before the establishment of the ICC.

Chapter 4 approaches the legislative histories of war rape and forced marriage in a constructivist way. It refers to the main actors in this process (Research Question 1), paying particular attention to the role of NGOs (Hypothesis 1). Chapter 4 also considers what influenced the actors (Research Question 2), how they understood the crimes of war rape and forced marriage (Research Question 3), and how they influenced the way they were defined (Research Question 4). However, an in-depth analysis of the normative structures and actors that are mutually shaped would be too comprehensive and therefore is beyond the scope of this chapter.

## 4.2 War rape

### 4.2.1 Early bilateral and multilateral conventions

Preceded by national military codes,<sup>261</sup> early bilateral and multilateral conventions such as the Treaty of Amity and Commerce (1785)<sup>262</sup> frame sexual war violence against

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<sup>261</sup> Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (24 April 1863) (Lieber Code) <[http://avalon.law.yale.edu/19th\\_century/lieber.asp#sec2](http://avalon.law.yale.edu/19th_century/lieber.asp#sec2)> accessed 09 August 2013; Rules and Articles of War, Order No. 20 (1847) (United States of America); Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Kluwer International Law 1997) 34; Viseur Sellers, 'The Context of Sexual Violence' (n 59) 266-267, 271-273.

<sup>262</sup> Treaty of Amity and Commerce (10 September 1785) <[http://avalon.law.yale.edu/18th\\_century/prus1785.asp](http://avalon.law.yale.edu/18th_century/prus1785.asp)> accessed 09 August 2013; James T Connolly and others (eds), *The Adams Papers: Papers of John Adams, Volume 16, February 1784 – March 1785* (The Belknap Press of Harvard University Press 2012): The Treaty of Amity and Commerce established a commercial alliance between the Kingdom of Prussia and the United States of America (USA, US). It was negotiated by Prussian Minister to the Netherlands, Friedrich Wilhelm Baron von Thulemeier, and US

women as molestation which “shall not” happen. It is put into context with the destruction of property like homes, goods and fields. Article 38 of the Declaration of Brussels (1874)<sup>263</sup> conveys an understanding of war rape as a crime of troop discipline, an illegal but inevitable occurrence during armed conflict,<sup>264</sup> as well as an honour crime. It states that “[f]amily honour and rights [...] must be respected.” The same formulation is included in Article 49 of the Oxford Manual of the Laws and Customs of War (1880)<sup>265</sup> and in Article 46 of the fourth Hague Convention (1907).<sup>266</sup>

This understanding of war rape as an honour crime established rape as particularly harmful and therefore necessary to be legally addressed. It highlights that war rape causes intense suffering of the survivor as well as the disintegration of communities. The understanding of rape as an honour crime reflects the purpose of war rape as targeting a whole community rather than ‘just’ the individual survivors. Nevertheless, survivors are often stigmatised and excluded from their communities. Therefore, even if the understanding of rape as an honour crime that inflicts collective harm is in line with the purpose of war rape, it is detrimental to survivors. Their individual violation is subsumed under the violation of the community. The understanding of war rape as an honour crime

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ambassadors to the Netherlands and France John Adams, Thomas Jefferson and Benjamin Franklin. It was signed by Frederick the Great and George Washington.

<sup>263</sup> Project of an International Declaration Concerning the Laws and Customs of War (27 August 1874) (Declaration of Brussels) <<http://www.icrc.org/ihl/INTRO/135>> accessed 09 August 2013; International Committee of the Red Cross, ‘Project of an International Declaration Concerning the Laws and Customs of War. Brussels, 27 August 1874’ <<http://www.icrc.org/ihl/INTRO/135>> accessed 13 August 2013: The Brussels Declaration is the draft of an international agreement concerning the laws and customs of war. It was written by the Russian government under Czar Alexander II and examined by delegates of fifteen European states.

<sup>264</sup> David S Mitchell, ‘The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine’ (2005) 15 *Duke Journal of Comparative and International Law* 219.

<sup>265</sup> Institute of International Law ‘Manual of the Laws and Customs of War’ (09 September 1880) (Oxford Manual) <<http://www1.umn.edu/humanrts/instree/1880a.htm>> accessed 09 August 2013; International Committee of the Red Cross, ‘Project of an International Declaration Concerning the Laws and Customs of War. Brussels, 27 August 1874’ (n 263); International Committee of the Red Cross, ‘The Laws of War on Land. Oxford, 9 September 1880’ <<http://www.icrc.org/ihl/INTRO/140?OpenDocument>> accessed 21 October 2013: The Oxford Manual was drafted by Gustave Moynier, Lawyer and then President of the International Committee of the Red Cross. It was adopted by the Institute of International Law.

<sup>266</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land (18 October 1907) 36 Stat 2277, 187 CTS 2271, Bevens 631, 205 Consol TS 277, 3 Martens Nouveau Recueil (ser 3) 461; Charnovitz, ‘Two Centuries of Participation’ (n 145) 197; Visser Sellers, ‘The Context of Sexual Violence’ (n 59) 275: The fourth Hague Convention was drafted with the aim to preserve the civil society of warring states and to pacify the defeated population. Among others, Ruy Barbosa (Brazil), Lord Reay Donald James Mackay, Sir Ernest Satow and Eyre Crowe (Britain), Fyodor Martens (Russia), and José Batlle y Ordóñez (Uruguay) participated in the drafting. In addition, the president of the conference officially received two delegates from the International Council of Women.

denies the complex physical and psychological harm rape causes survivors and overlooks considerations of sexual autonomy.<sup>267</sup> It “legitimise[s] and entrench[es] the idea that the rape [...] harmed a wife, daughter, or sister because it impugned a husband’s, father’s, or brother’s honor.”<sup>268</sup> Therefore, the understanding of war rape as an honour crime results in a relational view of women.<sup>269</sup>

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<sup>267</sup> Judith Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’ (1997) 46 *International and Comparative Law Quarterly* 55; Halley, ‘Rape at Rome’ (n 34) 56-58; Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 612; Quéniwet (n 59) 94-95; United Nations Division for the Advancement of Women, ‘Sexual Violence and Armed Conflict: United Nations Response’ (April 1998) <<http://www.un.org/womenwatch/daw/public/cover.htm>> accessed 20 November 2014; Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50); See also Rhonda Copelon, ‘Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law’ (1994) 5 *Hastings Women’s Law Journal* 243, 243; Judith Gardam, ‘Law of Armed Conflict: A Gendered Regime?’ in Dorinda G Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (American Society of International Law 1993) 171.

<sup>268</sup> Halley, ‘Rape at Rome’ (n 34) 57.

<sup>269</sup> Judy Groves and Cathia Jenainati, *Feminism: A Graphic Guide* (2<sup>nd</sup> edn, Icon Books 2013) 1-75: In the Anglo-speaking world of the 18<sup>th</sup>, 19<sup>th</sup> and early 20<sup>th</sup> century, women had no formal rights and were not represented in the law. In marriage, women belonged to their husbands. Advice manuals, literary books and public sermons stereotyped women and contributed to the ideal of domesticity which ascribed to women a strictly private function, and a public role to men. Women’s dedication to the home and family was linked to patriotism. Any suggestions of crossing gendered boundaries were considered a threat to the stability of social order. Feminists – a term that came into English usage around 1890 – were portrayed as immoral, bad mothers and lesbians to scare women away from the movement.

Against this background, women’s movements challenged the prevalent bio-essentialist view of women as weak and irrational, justifying the control of women by a male representative of authority such as the father or husband, but also a member of the clergy or the law. Based on personally experienced injustices, (middle-class) women’s movements challenged women’s lack of access to education, unequal employment opportunities and unjust marriage laws. They discussed opportunities for women to combine marriage and motherhood with a career. They advocated women’s contraceptive rights, abortion laws and women’s right to participation in public life. They, largely unsuccessfully, campaigned for women’s suffrage.

Reinterpretation of the bible, active participation in religious communities, reason and free enquiry, education, legal equality with men, active participation in law-making, and a combination of marriage, motherhood and a career were seen as ways towards women’s emancipation and empowerment. This indicates a relational and individualist perspective of women which still seemed complementary. The relational view envisioned an egalitarian society based on a non-hierarchical difference between men and women with a heterosexual couple as the basic unit of society. Women contribute to society uniquely but equally to men through childbearing. The individualist perspective, in contrast, conceived the individual as the basic unit of society. It stressed the individual’s needs for personal fulfilment and autonomy and that a person’s role should not be defined by sex/gender.

At least from the late 18<sup>th</sup> century on, women’s rights advocates and activists voiced their experiences and thoughts through public protests, in public speeches and lectures, at meetings and conventions, and in declarations, books, essays and newspapers.

#### 4.2.2 *The attempt to establish an international criminal tribunal after the First World War*

After the First World War, the German Reich and the Axis Powers were accused of having committed crimes of rape and abduction for the purpose of forced prostitution constituting violations of the laws and customs of war.<sup>270</sup> Article 227 of the Versailles Treaty (1919) contains a statement of responsibility of the German Emperor for an “offence against international morality and the sanctity of treaties” which can be interpreted to include war rapes. The War Crimes Commission<sup>271</sup> recommended that war criminals be tried before an international tribunal.<sup>272</sup> However, this first attempt to hold individuals, including acting heads of state, accountable for violations of the laws and customs of war failed due to political considerations such as whether a political leader could be held individually liable for war crimes and whether national or international military courts would be the proper juridical forum for such a critical endeavour.<sup>273</sup>

As shown above, bilateral and multilateral agreements prohibited war rape long before the First World War. War rapes had been prosecuted before international tribunals at least twice before. First, in 1474, Peter von Hagenbach was put before an international tribunal for the violation of the rules and customs of war during the occupation of Breisach, Germany. Von Hagenbach was charged with instituting a reign of terror without

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<sup>270</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, ‘Report Presented to the Preliminary Peace Conference’ (1920) 14 American Journal of International Law 95, 112-115.

<sup>271</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (n 270) 95-97: The Paris Peace Conference created the War Crimes Commission in 1919. The War Crimes Commission consisted of fifteen male members, two of each of the Great Powers (the United States of America, the British Empire, France, Italy and Japan) and five from the powers with special interests (Belgium, Greece, Poland, Romania and Serbia). “The Commission was charged to inquire into and report upon the following points: 1. The responsibility of the authors of the war. 2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war. 3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed. 4. The constitution and procedure of a tribunal appropriate for the trial of these offences. 5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.”

<sup>272</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (n 270) 141.

<sup>273</sup> Askin, *War Crimes against Women* (n 261) 42-45; Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 22; M Cherif Bassiouni, ‘The Perennial Conflict Between International Criminal Justice and Realpolitik’ (2006) 22 Georgia State University Law Review 541; Antonio Cassese, *International Law* (2<sup>nd</sup> edn, Oxford University Press 2005) 454; Benedict Kingsbury, ‘International Courts: Uneven Judicialisation in Global Order’ in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 207; Ahmed M Rifaat, *International Aggression: A Study of the Legal Concept: Its Development and Definition in International Law* (Humanities Press 1979) 41-42; Viseur Sellers, ‘The Context of Sexual Violence’ (n 59) 276-277.



first having declared war. He was found guilty of rape, murder and other crimes against the laws of nature and God committed by his troops.<sup>274</sup> Second, after Napoleon's escape from the Island of Elba, where he was exiled after his defeat in the Battle of Waterloo, the Allied monarchs deliberated his fate informally. After initially declaring Napoleon a threat to the peace and security of Europe, they folded under Prussia's pressure and also charged Napoleon with atrocities committed by troops under his command against civilians during the wars of 1805-1815. These crimes included rape. Napoleon was sentenced to exile on the Island of St Helena.<sup>275</sup> Against this background, it could be argued that already in the early 20<sup>th</sup> century, war rape was acknowledged as a war crime that was standard to be included in the War Crimes Commission's list of appropriate crimes to be investigated after the First World War rather than a conscious effort to investigate acts of sexualised war violence. However, charging Kaiser Wilhelm II with acts of sexualised war violence could also be interpreted as a strong symbolic act. It could be understood as an attempt by the Allied leaders to morally rise above the German Emperor. Charging Kaiser Wilhelm II with war rape could be viewed as an indirect public condemnation of the crimes committed and as a statement that the Allied powers themselves treated enemy civilian women with respect and would not commit such acts.<sup>276</sup> It can also be understood as an attempt to morally justify the Allied participation and their peoples' suffering by showing how unfit,

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<sup>274</sup> Askin, *War Crimes against Women* (n 261) 28-29; Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 17; Bassiouni, 'The Perennial Conflict Between International Criminal Justice and Realpolitik' (n 273); Gabrielle Clear-Stamm, *Pierre de Hagenbach: Le destin Tragique d'un Chevalier Sundgauvien au Service de Charles le Téméraire* (Société d'Histoire du Sundgau 2004) 175; Hermann Heimpel, 'Mittelalter und Nürnberger Prozeß' in — — (ed), *Festschrift Edmund E Stengel zum 70. Geburtstag am 24. Dezember 1949 Dargebracht von Freunden, Fachgenossen und Schülern* (Böhlau 1952) 324-325; John Foster Kirk, *History of Charles the Bold, Duke of Burgundy* (JP Lippincott & Co 1864) 435, 493-494; Charles Nerlinger, *Pierre de Hagenbach et la Domination Bourguignonne en Alsace, 1469-1974* (Persée 1890) 131; Viseur Sellers, 'The Context of Sexual Violence' (n 59) 267-268: Von Hagenbach was tried before a tribunal of twenty-eight judges from different regional city-states. The chief magistrate of Ensisheim in Austria, Thomas Schutz, was the presiding judge. The prosecutor was the Alsatian bailiff Hermann von Eptingen. Heinrich Iselin, one of the commissioners from Basel, presented the prosecution's case to the court. Hans Army, a representative from Basel, took on von Hagenbach's representation.

<sup>275</sup> Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 18-19.

<sup>276</sup> Brownmiller, *Against Our Will* (n 59) 31-113; Robert Graves, *Goodbye to all that* (Penguin Books 1957) 153; Harold D Lasswell, *Propaganda Technique in the World War* (Peter Smith 1938) 82: Most records of sexualised atrocities committed during the First World War focus on war rapes committed during the first three months of the war by German troops against Belgian and French civilian women during the invasion and occupation of the two states. Few indications, however, point towards Allied soldiers as perpetrators of sexualised war violence as well. Harold D Lasswell stated in his study *Propaganda Technique in the World War*: "A young woman, ravished by the enemy, yields a secret satisfaction to a host of vicarious ravishers in the other side of the border. [...] Hence, perhaps, the popularity and ubiquity of such stories." In his autobiography *Goodbye to All That*, Robert Graves, a captain in the Royal Welsh Fusiliers during the First World War, wrote: "We did not believe rape to be any more common on the German side of the line than on the Allied side."

immoral and cruel their opponent was and how desperately civilians needed to be protected from him. Focusing on the actors involved in the Paris Peace Conference resulting in the Treaty of Versailles, charging Kaiser Wilhelm II with acts of sexualised war violence might also have been motivated by presentations made to the leaders of the League of Nations Commission by the International Council of Women and the Inter-Allied Conference of Women Suffragists.<sup>277</sup> However, rather than focusing on war rape, they sought

“an agreement to suppress traffic in women, the eligibility of females for League employment, the right of women to vote in plebiscites on changes in nationality, creation of international bureaus of education and public health, and a statement in favor of arms control. Language reflective of some of these demands appeared in the Treaty of Versailles.”<sup>278</sup>

The First World War resulted in 6.5 million deaths,<sup>279</sup> leaving many women widowed. Building on women’s activism and advocacy, which had become increasingly organised in the Anglo-speaking world over the last century, single, educated, financially independent women in the 1920s became more outspoken and promoted non-family-based ways of life. This is a move away from the previously dominant understanding of women primarily as wives and mothers and even goes beyond considerations of a combination of marriage and motherhood with a career as the best way of life for women. This, however, stood in stark contrast to the need for women to conceal that they had a mind of their own and to disguise physical desires. Here it becomes apparent that the first half and middle of the 20<sup>th</sup> century was a time of contradicting developments in women’s history.<sup>280</sup>

Taking the promotion of non-family-based ways of life together with an increasing recognition of women’s varied experiences and needs, an individualist perspective on women gained prevalence over a complementary individualist and relational view that had existed up until then. While the Second World War saw a return to women’s combined role as mothers and workers, individualism’s respect for Human Rights and its dismissive position towards sex/gender essentialism became the representative way of thinking for

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<sup>277</sup> Charnovitz, ‘Two Centuries of Participation’ (n 145) 214.

<sup>278</sup> *ibid* (references omitted).

<sup>279</sup> — — ‘WWI Casualty and Death Tables’ <[http://www.pbs.org/greatwar/resources/casdeath\\_pop.html](http://www.pbs.org/greatwar/resources/casdeath_pop.html)> accessed 01 April 2015.

<sup>280</sup> Groves and Jenainati (n 269) 1-81.

women after the Second World War.<sup>281</sup> This development of thought, however, was not reflected in the jurisprudence of the International Military Tribunal (IMT, Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTFE, Tokyo Tribunal) regarding sexualised crimes and only caught on in this field in the late 20<sup>th</sup> century.

#### 4.2.3 International military tribunals after the Second World War

After the Second World War, within the framework of the IMT and IMTFE, high-ranking military and civilian officials were individually held accountable under International Law for crimes against peace, war crimes and crimes against humanity.<sup>282</sup> Acts of sexualised violence were excluded from the list of crimes of the Nuremberg trials.<sup>283</sup> However, in the judges' elaboration on the acts constituting war crimes, they implicitly determine that disrespect for the honour and rights of the family as covered under Article 46 of the fourth Hague Convention was considered a war crime under Article 6(b) of the IMT charter.<sup>284</sup> Acts of sexualised war violence would also have been chargeable on the basis of Article 6(b) of the IMT charter as the war crime of ill-treatment

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<sup>281</sup> Groves and Jenainati (n 269) 17-19, 77.

<sup>282</sup> *Trial of General Tomoyuki Yamashita*, Case No. 21, IV Law Reports of Trials of War Criminals 1, United States Military Commission, Manila (08 October - 07 December 1945); Kelly Dawn Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley Journal of International Law 288; Askin, *War Crimes against Women* (n 261) 122-125, 192-201; Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 39; Allied Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity (20 December 1945) 3 Official Gazette Control Council for Germany 50-55 (1946) gave authority to twelve subsequent trials conducted by the United States of lesser German war criminals. Article 2(1)(c) explicitly includes rape as a crime against humanity. There was little jurisprudence on rape but during *United States of America v Karl Brandt and others* (21 November 1946 - 20 August 1947), *United States of America v Josef Altstötter and others* (17 February 1947 - 4 December 1947), *United States of America v Pohl and others* (13 January 1947 - 11 August 1948) and *United States of America v Ulrich Greifelt and others* (07 July 1947 - 10 March 1948), forced sterilisation, forced abortion and sexual mutilation were mentioned. Therefore, the significance of Control Council Law No. 10 regarding war rape lies not in straightforward jurisprudence on the subject but rather in its explicit acknowledgement of rape as a crime against humanity. Similarly, based on the Pacific Regulations of 24 September 1945 Governing the Trial of War Criminals, General Yamashita was tried by the Allied powers before a US military commission in Manila. He was accused, and found guilty, of having failed to control his troops and permitting them to perpetrate war crimes such as rapes.

<sup>283</sup> Charter of the International Military Tribunal (08 August 1945) 82 UNTS 279, 59 Stat 1544, 3 Bevans 1238, 39 AJILs 258 (London Agreement).

<sup>284</sup> *The United States of America and others v Hermann Wilhelm Göring and others* in International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal, Vol. I* (Nuremberg 1947) 232.

of civilians, and on the basis of Article 6(c) of the IMT charter under other inhumane acts constituting a crime against humanity<sup>285</sup> if the requisite elements would have been met.<sup>286</sup>

Evidence of rape in the form of witness testimonies, police reports, medical certificates and affidavits<sup>287</sup> supporting charges of torture and of having conceived, willed, ordained or tolerated a systematic policy of terror and extermination of civilians<sup>288</sup> was submitted by Mr Charles Dubost, Deputy Chief Prosecutor for the French Republic,<sup>289</sup> and Chief Counsellor of Justice LN Smirnov.<sup>290</sup> However, especially Mr Dubost “avoid[ed] citing the atrocious details”<sup>291</sup> and consequently the Nuremberg Tribunal failed to publicly document sexual atrocities committed during the Second World War. The judgment also does not specify how much weight was given to sexualised violence.<sup>292</sup> Reflecting an understanding of war rapes as an unavoidable collateral damage of every war, the IMT failed to confirm explicitly the legal and moral importance of prosecuting sexualised war violence against women.<sup>293</sup> One reason for this could be the Allies’ own culpability for committing acts of sexualised war violence.<sup>294</sup>

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<sup>285</sup> London Agreement (n 283).

<sup>286</sup> For further explanation on rape as an inhumane act see section 4.2.6.2.

<sup>287</sup> Viseur Sellers, ‘The Context of Sexual Violence’ (n 59) 282.

<sup>288</sup> London Agreement (n 283) art 6(c); *The United States of America and others v Hermann Wilhelm Göring and others* Vol. I (n 284) 254-255; *The United States of America and others v Hermann Wilhelm Göring and others* in International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal, Vol. VI* (Nuremberg 1947) 178, 419, 422; *The United States of America and others v Hermann Wilhelm Göring and others* in International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal, Vol. VII* (Nuremberg 1947) 442.

<sup>289</sup> *The United States of America and others v Hermann Wilhelm Göring and others* Vol. VI (n 288) 178, 404-407.

<sup>290</sup> *The United States of America and others v Hermann Wilhelm Göring and others* Vol. VII (n 288) 453-457, 467, 494.

<sup>291</sup> *The United States of America and others v Hermann Wilhelm Göring and others* Vol. VI (n 288) 405.

<sup>292</sup> *The United States of America and others v Hermann Wilhelm Göring and others* Vol. I (n 284) 287-288, 291-296; Viseur Sellers, ‘The Context of Sexual Violence’ (n 59) 285-296; The conviction of Joachim von Ribbentrop, Ernst Kaltenbrunner, Alfred Rosenberg and Wilhelm Keitel might have depended on submissions about sexualised war violence.

<sup>293</sup> Askin, *War Crimes against Women* (n 261) 96-128, 163; Campanaro (n 59) 2561-2562; Cole, ‘International Criminal Law and Sexual Violence’ (n 59) 49; Gardam and Jarvis (n 59) 204-205; Merton (n 59) 425; Gabriela Mischkowski, ‘Sexualisierte Kriegsgewalt: Strafverfolgung und Wahrheitsfindung’ in medica mondiale and Karin Griesse (eds), *Sexualisierte Kriegsgewalt und ihre Folgen: Handbuch zur Unterstützung traumatisierter Frauen in verschiedenen Arbeitsfeldern* (2<sup>nd</sup> edn, Mabuse-Verlag 2006) 97.

<sup>294</sup> Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 28; Joanna Bourke, *Rape: A History from 1860 to the Present Day* (Virago 2007) 360-362; Brownmiller, *Against Our Will* (n 59) 64-78; Seifert (n 8).

In contrast to the Nuremberg Tribunal, the Tokyo Tribunal explicitly included sexualised war violence in the indictment<sup>295</sup> and judgment.<sup>296</sup> Without further defining the crime, the IMTFE addressed war rape as inhumane treatment,<sup>297</sup> mistreatment<sup>298</sup> and disrespect for the rights and honour of the family,<sup>299</sup> constituting war crimes under Article 5(b) of the IMTFE charter.<sup>300</sup> Evidence of acts of sexualised war violence in Borneo, Burma, China, French Indochina, Java and the Philippines was presented<sup>301</sup> but international male observers testified in place of survivors.<sup>302</sup> Eventually, the charges were only related to the rapes of Nanking.<sup>303</sup> Establishing it as the first of many atrocities committed, the American delegation used the rapes committed in Nanking as a cornerstone for the argument that Japan conspired to commit war crimes.<sup>304</sup> Eventually, Iwande Matsui<sup>305</sup> and Koki Hirota<sup>306</sup> were found guilty on the basis of command responsibility for war crimes and crimes against humanity including rape.

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<sup>295</sup> *The United States of America and others v Sadao Araki and others* (Indictment) No. 1 (03 May 1946) in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press 2008) 62.

<sup>296</sup> *The United States of America and others v Sadao Araki and others* (Judgment) No. 1 (November 1948) in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press 2008) 535-539.

<sup>297</sup> *The United States of America and others v Sadao Araki and others* Indictment (n 295) 59.

<sup>298</sup> *The United States of America and others v Sadao Araki and others* Indictment (n 295) 60.

<sup>299</sup> *The United States of America and others v Sadao Araki and others* Indictment (n 295) 62.

<sup>300</sup> Charter of the International Military Tribunal for the Far East (19 January 1946) TIAS 1589.

<sup>301</sup> Gardam and Jarvis (n 59) 206-207; Viseur Sellers, 'The Context of Sexual Violence' (n 59) 288.

<sup>302</sup> Arnold C Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Fontana 1999) 184-204; Campanaro (n 59) 2563; Merton (n 59) 426; Mischkowski, 'Sexualisierte Gewalt im Krieg' (n 8) 598; Viseur Sellers, 'The Context of Sexual Violence' (n 59) 289; Surgeon Dr Robert O Wilson, Professor of History Miner Searl Bates and Minister John G Magee gave testimony of rapes of civilian Chinese women committed on a large scale. The diaries and letters of Missionary George A Fitch, Reverend James M McCallum, Senior Chief of the Siemens AG China Corporation John Rabe and Professor of Sociology Lewis SC Smythe that were submitted as evidence told a similar story. All of these witnesses were either American or educated in the United States. Hsu Chuan-ying, an official from the Chinese Ministry of Railways and member of the Red Swastika, was among the few Chinese witnesses testifying on war rape.

<sup>303</sup> *The United States of America and others v Sadao Araki and others* Judgment (n 296) 535-539.

<sup>304</sup> Timothy Brook, 'The Tokyo Judgment and the Rape of Nanking' (2001) 60 *The Journal of Asian Studies* 673, 677.

<sup>305</sup> *The United States of America and others v Sadao Araki and others* Judgment (n 296) 538, 612; Brackman (n 302) 17, 377; Brook (n 304) 679-682: Matsui was a senior officer in the Japanese Army. During the attack on Nanking, he spent several days in the city. Even though in his defence he was inconsistent about his degree of knowledge of the rapes in Nanking, the judges found that he knew or must have known about the misbehaviour of the army but did nothing effective to halt and investigate the atrocities.

<sup>306</sup> *The United States of America and others v Sadao Araki and others* Judgment (n 296) 538, 604; Brook (n 304) 683: Hirota occupied the post of Foreign Minister at the time the massacre of Nanking evolved. He immediately received reports of the atrocities and the matter was taken up with the War Ministry. Hirota was

Even though seven women were members of the prosecution staff of the IMTFC,<sup>307</sup> the Nuremberg and Tokyo tribunals can be categorised as male for the drafters of their charters,<sup>308</sup> the judges, chief prosecutors and defendant counsels were men.<sup>309</sup> They applied male-centred frameworks to sexualised crimes and failed to grasp war rapes as linked to patriarchy. As such, they saw rapes as violations of the honour and rights of the family. This patriarchal view was further reinforced by the fact that in the IMTFC, international male observers testified about war rapes in place of the survivors themselves. Without going into details, evidence of war rapes was submitted in support of charges of crimes against peace,<sup>310</sup> torture,<sup>311</sup> terror<sup>312</sup> and extermination<sup>313</sup> rather than in support of acts of violence against women. Sexualised war violence against women was understood as an unavoidable collateral damage instead of as a weapon of war.

#### 4.2.4 The fourth Geneva Convention

Article 27(2) of the fourth Geneva Convention<sup>314</sup> was the first article of an international treaty to directly name rape. However, even though twenty-five out of 327 delegates, experts and observers at the Geneva Conference of 1949 were women,<sup>315</sup> none

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content to rely on the War Ministry's assurance that the atrocities would be stopped and took no further action.

<sup>307</sup> Askin, *War Crimes against Women* (n 261) 166; Ni Aolain, 'Gendered Harms and Their Interface with International Criminal Law' (n 59) 4; Virginia Law, 'The Tokyo War Crimes Trial: A Digital Exhibition: People' <<http://lib.law.virginia.edu/imtfc/people>> accessed 06 September 2013: They were Miss Virginia Bowman, Miss Lucille Brunner, Miss Marjorie N Culverwell, Miss Eleanor Jackson, Mrs Helen Grigware Lambert, Mrs Grace Kanode Llewelyn and Miss Bettie Renner.

<sup>308</sup> Askin, *War Crimes against Women* (n 261) 165-166.

<sup>309</sup> Virginia Law (n 307).

<sup>310</sup> *The United States of America and others v Sadao Araki and others* Judgment (n 296) 17, 535-539.

<sup>311</sup> *The United States of America and others v Hermann Wilhelm Göring and others* Vol. VII (n 288) 456-457.

<sup>312</sup> *The United States of America and others v Sadao Araki and others* Judgment (n 296) (n 370) 547-548; *The United States of America and others v Hermann Wilhelm Göring and others* Vol. VI (n 288) 178, 404-407.

<sup>313</sup> *The United States of America and others v Sadao Araki and others* Judgment (n 296) (n 370) 547-548; *The United States of America and others v Hermann Wilhelm Göring and others* Vol. VI (n 288) 404-407.

<sup>314</sup> Geneva Convention (IV) (n 108).

<sup>315</sup> Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 'Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 1' (Federal Political Department Berne 1963) 157-180 <[http://www.loc.gov/rr/frd/Military\\_Law/pdf/Dipl-Conf-1949-Final\\_Vol-1.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf)> accessed 15 August 2013; Diplomatic Conference for the Establishment of International Conventions

of them contributed to the discussion of Article 27 on the treatment of protected persons in the territory of the parties to the conflict and in occupied territory.<sup>316</sup> International women's organisations, in contrast, were more involved. Without dissent,<sup>317</sup> the proposal of the International Council of Women and the International Abolitionist Federation reading "[w]omen shall be specially protected against any attacks on their honour, in particular against rape, enforced prostitution and any form of indecent assault"<sup>318</sup> was accepted and eventually became Article 27(2) of the fourth Geneva Convention.<sup>319</sup>

Despite the juridical progress of explicitly prohibiting war rape, a clear definition of the elements of the crime remained missing. The main points of focus of the relevant articles are male notions of honour rather than bodily integrity.<sup>320</sup>

#### *4.2.5 Mid-1970s until mid-1990s*

In the period from the mid-1970s to the mid-1990s, international agreements and documents framed war rape as an issue of protecting women and their fundamental rights.

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for the Protection of Victims of War, 'Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section A' (Federal Political Department Berne 1963) 638-639, 641, 645-646, 651, 670-671, 680, 693, 700, 701-702, 710, 717-718, 724, 750, 763, 771-772, 780, 784 <[http://www.loc.gov/rr/frd/Military\\_Law/pdf/Dipl-Conf-1949-Final\\_Vol-1.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf)> accessed 15 August 2013: ML Barble was an observer representing the International Refugee Organisation. Cynthia Digby and Joan Wigglesworth of Australia, Maria Papouktchieva of Bulgaria, Ursula Robbins of Canada, Karen Arentzen of Denmark, A Dutt of India, Renée Florence van Asch van Wyck of the Netherlands, Beryl Winifred Day of New Zealand, Carmen Christophersen of Norway, Phyllis Manger of Pakistan and Elisabeth Geijer of Sweden were secretaries. Maricelsa de la Luz León of Costa Rica participated as an interpreter. Anna Kara of Hungary, Britta de Vegesack of Sweden, Denise Robert of Switzerland and Sophia Mikhailovna Speranskaya of the Soviet Union were advisors to their respective state delegation. Carmen Dorich de Coquoz was the substitute delegate of Peru. Andrée Jakob of France, Elisabeth Kardos of Hungary, Ofelia Manole and Elisabeta Luca of Rumania, Maria Dmitrievna Kovrigina of the Soviet Union, and Jocye AC Gutteridge and Sheila M Beckett of the United Kingdom were their state's delegates. Mrs Kara and Mrs Luca also served as plenipotentiaries for their countries. Miss de Vegesack, Miss Jakob, Miss Manole, Mrs Luca, Mrs Speranskaya and Miss Robert were directly involved in the work of Committee 3 for the Establishment of a Convention for the Protection of Civilian Persons in Time of War.

<sup>316</sup> Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 'Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section A' (n 315) 643-644, 714, 787, 822: The discussion of this article in Committee 3 at the Geneva Conference mainly revolved around the age of children protected here and the meaning of 'special treatment'.

<sup>317</sup> Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 'Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section A' (n 315) 643, 822.

<sup>318</sup> Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, 'Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section A' (n 315) 643.

<sup>319</sup> Geneva Convention (IV) (n 108).

<sup>320</sup> Geneva Convention (IV) (n 108); Hague Convention (IV) (n 266); Deborah Blatt, 'Rape as a Method of Torture' (1992) 19 New York University Review of Law & Social Change 822, 831; Merton (n 59) 425-426.

Rape was seen as an issue of discrimination.<sup>321</sup> Before this will be elaborated on, it shall be noted that this understanding is in accord with, and can be traced back to,<sup>322</sup> demands for freedom from intimidation by (threat of) violence and an end to male aggression and domination characteristic of second wave feminism. This view is based on the understanding that in a patriarchal system, women and men are attributed a particular temperament, role and sexual status.<sup>323</sup> As argued in Chapter 2, in relation to rape, women are constructed as submissive, dependent victims, as subordinates. Men, in contrast, are

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<sup>321</sup> Groves and Jenainati (n 269): This understanding is in accord with, and can be traced back to, demands for freedom from intimidation by (threat of) violence and an end to male aggression and domination characteristic of second wave feminism, a term 'second wave feminism' was coined by Marsha Lear to describe the increase in feminist activity in the United States and Europe from the late 1960s on. In addition to male aggression, different schools within second wave feminism placed a focus on psychoanalysis; the question of gender; sexual orientation; women's bodies, their objectification and the male gaze; the male, Western literary canon; romance novels; and pornography. Second wave feminism also picked up some of the issues already raised by first wave feminism such as women's financial and legal independence, their discrimination in education and employment as well as contraception and abortion rights. Following early modern and 19<sup>th</sup> century women's advocacy and activism based on personal experiences, second wave feminism developed the slogan 'the personal is political'. This expressed that every aspect of women's private lives is affected by, and can affect, the political situations, highlighting a constructivist perspective. Building on an increasing recognition of women's varied experiences and needs that had developed in the 20<sup>th</sup> century, second wave feminism challenged the myth of a universal feminine experience. Since various feminist perspectives on women's lives had developed, the use of the plural 'feminisms' was established from the 1960s onwards, aiming to make the movement more inclusive and representative. However, third wave feminists from the early 1990s on argue that the discourse of Western feminism often homogenises and marginalises non-Western women. It depicts them as sexually constrained, ignorant and powerless victims of a patriarchal order which silences them, dictates their whole existence and forces them into financial dependence. Western women, in contrast are depicted as strong, assertive and in control. Non-Western women argue that Western feminists aggravate the silencing effects of patriarchy by speaking for non-Western women, ignoring their own efforts to counter socio-political injustice. However, rather than seeing the voice of the other as a threat, it should be included and allowed to enrich one's perspectives.

Opponents of second wave feminism, including academics, journalists and public speakers, claimed that the struggle for equal rights had been won and was over. "Women were invited to return to their homes and perform their roles as mothers and wives while benefiting from the limited political and social rights they had earned."

Disagreeing with this, some second wave feminists followed the perspective of the 1920s and advocated a non-family-based way of life that would lead to women's liberation. Like early feminists, other second wave feminists saw a combination of marriage, motherhood and a career as a way towards women's emancipation and empowerment. As mentioned above, others again stressed the understanding of women's oppression as based on their socially constructed status of a subordinated Other to dominant men that underlies all power relations. This patriarchal sex/gender system and ideology which ascribes a particular role, temperament and sexual status to women and men is inscribed into people's minds through the family, education literature and religion.

Like early feminists of the 18<sup>th</sup> century, second wave feminists recognised the continuous need to make their case heard by more people. To achieve this, they formed consciousness-raising and rap groups characterised by an unstructured, non-hierarchical approach. They also continued to publicise their experiences and thoughts through public protests, in public speeches and lectures, at meetings, and in books, essays and magazines.

<sup>322</sup> Association for Women's Rights in Development, 'History of the 1993 Vienna Conference on Human Rights' <<http://awid.org/News-Analysis/Special-Focus-Vienna-20/V20-Frontpages/History-of-the-1993-Vienna-Conference-on-Human-Rights>> accessed 11 November 2014; Chen (n 34).

<sup>323</sup> Groves and Jenainati (n 269) 86, 89.



constructed as assertive, aggressive perpetrators, as dominant. Based on this, women are discriminated against, preventing them from achieving complete equality with men.

The wording of Article 27(2) of the fourth Geneva Convention is repeated almost completely in Article 76(1) of Additional Protocol I<sup>324</sup> on the protection of women. A significant difference is the omission of any reference to honour. Paragraph 2 and 3 however, show that women are still seen in relation to others, as (future) mothers and carers. This point of view was emphasised during the drafting process of Additional Protocol I by Mr Felber of Germany, proposing “that the death penalty should not be pronounced on mothers of infants and on women or old persons responsible for their care and that it should not be pronounced or carried out on pregnant women.”<sup>325</sup> Reverend Father Roche of the Holy See also stressed that the aim of the prohibition of the death penalty for pregnant women under Paragraph 2 of Article 76 would be “to protect infants also.”<sup>326</sup> Similar to the course of the discussion during the drafting phase of Article 27 of the fourth Geneva Convention, the discussion of Article 76 of the Additional Protocol I centred on the question if the pronouncement and/or the execution of the death penalty of pregnant women and/or mothers of infants should be prohibited, and on providing for the quick release of pregnant women and mothers of infants from detention<sup>327</sup> rather than on the crime of war rape and its definition.

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<sup>324</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (08 June 1977) 1125 UNTS 3: Article 76 of the first Protocol Additional to the Geneva Conventions reads: “1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. 2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority. 3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.”

<sup>325</sup> Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, ‘Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva, 1974-1977, Vol. 15’ (Federal Political Department Berne 1978) 57 <[http://www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_Vol-15.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-15.pdf)> accessed 21 October 2013.

<sup>326</sup> Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (n 325) 60.

<sup>327</sup> Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (n 325) 463-464.

Partly disconnecting rape and honour, but still connecting it to shame, Article 4(e) of second Protocol Additional to the Geneva Conventions<sup>328</sup> explicitly prohibits rape as an outrage upon personal dignity, not a crime against a person's integrity. Not only the rape of women is prohibited but that of "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities".<sup>329</sup> Therefore, Additional Protocol II introduces a gender-neutral prohibition of rape.<sup>330</sup> However, this broad understanding was not initially intended. Originally, the aim was to draft a provision granting special protection to women. Contrary to Canada's proposal to draft a separate article,<sup>331</sup> an earlier draft of Article 6 contains Paragraph 3, stating that "women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution, and any other form of indecent assault."<sup>332</sup> The German delegate, Mr Partsch, voiced concern about this special paragraph on the protection of women on the ground that it would imply that the provisions set out in the other paragraphs of Article 6 would only apply to men.<sup>333</sup> Agreeing with this, Mr de Icaza of Mexico proposed for Paragraph 3 to generally state that women should be the subject of special respect.<sup>334</sup> Reinforcing the category of 'women and children', Mr de Schutter of Belgium suggested the inclusion of 'children' to the special provision to create a parallel between Article 6(3) and Article 32(1) of the draft Protocol II.<sup>335</sup> The Belgian delegation submitted an amendment to this effect which was adopted by Committee I.<sup>336</sup> Eventually however, Canada's earlier proposal to create a separate article

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<sup>328</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (08 June 1977) 1125 UNTS 609: Article 4(e) of the second Protocol Additional to the Geneva Conventions reads: "1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: [...] (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".

<sup>329</sup> Additional Protocol II (n 328) art 4(1).

<sup>330</sup> Quéniwet (n 59) 14: While a gender-neutral definition of rape is widely supported, it also can be considered to obscure "the reality that an overwhelming majority of rape victims are women [and that] it dismisses the gender power relations expressed through men's sexual violence towards women."

<sup>331</sup> Howard S Levie (ed), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (Martinus Nijhoff Publishers 1987) 138.

<sup>332</sup> Levie (n 331) 137.

<sup>333</sup> Levie (n 331) 141.

<sup>334</sup> Levie (n 331) 142.

<sup>335</sup> Levie (n 331) 144.

<sup>336</sup> Levie (n 331) 148, 158.

on the protection of women was revived and adopted.<sup>337</sup> Mr Hussain of Pakistan agreed to include ‘rape’ in Article 6(2)(e) and it was decided that Article 6(3) was now redundant.<sup>338</sup> The final draft of Article 6 does not mention any special provisions for women or children.<sup>339</sup>

Pushed by reports on sexualised war violence committed in the conflicts in the former Yugoslavia, the process of recognising sexualised war violence against women as crimes to be tried before international tribunals gained momentum. The subject matter was addressed in various fora in which “[t]he international women’s movement was instrumental in the advances made on women’s human rights”.<sup>340</sup> General Comment No. 19 of the Committee on the Elimination of Discrimination against Women in 1992,<sup>341</sup> the Declaration on the Elimination of Violence against Women (DEVAW, 1993),<sup>342</sup> the 1993 Declaration and Programme of Action adopted at the Vienna Conference,<sup>343</sup> the 1994 Report of the International Conference on Population and Development (Cairo Conference),<sup>344</sup> and the Platform for Action developed at the Beijing Conference (1995)<sup>345</sup>

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<sup>337</sup> Levie (n 331) 153.

<sup>338</sup> Levie (n 331) 184.

<sup>339</sup> Levie (n 331) 170.

<sup>340</sup> Association for Women’s Rights in Development, ‘History of the 1993 Vienna Conference on Human Rights’ (n 322); Chen (n 34) 487.

<sup>341</sup> Committee on the Elimination of Discrimination against Women ‘General Recommendation No. 19’ (29 July 1994) UN Doc HRI/GEN/1/Rev.1.

Committee on the Elimination of Discrimination against Women, ‘The Committee on the Elimination of Discrimination against Women Marks its 25th Anniversary in 2007’ <<http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAWListMembersNew.pdf>> accessed 13 August 2013; Committee on the Elimination of Discrimination against Women, ‘Introduction’ <<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>> accessed 13 August 2013; Committee on the Elimination of Discrimination against Women, ‘Membership of the Committee on the Elimination of Discrimination against Women [As of 1 January 2013 and up to 31 December 2016]’ <<http://www2.ohchr.org/english/bodies/cedaw/membership.htm>> accessed 13 August 2013: The Committee on the Elimination of Discrimination against Women historically is an exclusively female body consisting of twenty-three experts on women’s rights.

<sup>342</sup> UNGA ‘Declaration on the Elimination of Violence against Women’ (20 December 1993) UN Doc A/RES/48/104 (DEVAW).

Chinkin, ‘Violence Against Women’ (n 10) 26; Stop Violence Against Women, ‘DEVAW’ (14 September 2007) <<http://www.stopvaw.org/devaw>> accessed 13 August 2013: This was a result of efforts of the United Nations Commission on the Status of Women, together with legal experts, women’s rights activists and the United Nations Economic and Social Council to address violence against women.

<sup>343</sup> The World Conference on Human Rights ‘Vienna Declaration and Programme of Action’ (12 July 1993) UN Doc A/CONF.157/23.

<sup>344</sup> International Conference on Population and Development ‘Report’ (13 September 1994) UN Doc A/CONF.171/13/Rev.1.

frame violence against women as an issue of discrimination. It is understood as a barrier to the full enjoyment and recognition of fundamental rights and freedoms for women. Violence against women is seen as socially constructed and related to power.<sup>346</sup> Therefore, rape is explicitly included as a form of gender-based rather than sexual violence that is linked to disrespect for women's "integrity and dignity".<sup>347</sup> A link is established between the discrimination against, and disadvantages of, women in everyday life and the general vulnerability of women in wartime.<sup>348</sup>

"Many sexual rights advocates point to the 1990s as a decade of significant successes in [UN] arenas for women's human rights. From the acknowledgement in Vienna in 1993 that women's rights are human rights and that violence against women is a human rights issue, to Cairo's 1994 placing of women's rights and empowerment as central to issues of population and development, to the 1995 Beijing conference's overt reference to women's rights to have control over their own sexuality, each major UN world conference seemed to offer feminist advocates new tools for holding governments accountable for respecting, protecting and fulfilling women's rights – and their bodily integrity."<sup>349</sup>

Women's rights advocates from all over the world "sought to bring a feminist analysis and women's presence to bear on global issues of peace, security, development, environment, and human rights"<sup>350</sup> through influencing the Vienna, Cairo and Beijing conferences.<sup>351</sup> Experiences of women's rights advocates in the world conferences on women<sup>352</sup> taught women's rights advocates at the ICC negotiations that "women's voices have little chance

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<sup>345</sup> The Fourth World Conference on Women 'Report' (27 October 1995) UN Doc A/CONF.177/20 art 142(b).

<sup>346</sup> DEVAW (n 342).

<sup>347</sup> Committee on the Elimination of Discrimination against Women 'General Recommendation No. 19' (n 341).

<sup>348</sup> Gardam and Jarvis (n 59) 163-164.

<sup>349</sup> Rothschild (n 34) 107.

<sup>350</sup> Charlotte Bunch, 'Legacy of Vienna: Feminism and Human Rights' (International Expert Conference on Vienna + 20, Vienna, 27 June 2013) <[http://www.cwgl.rutgers.edu/component/docman/doc\\_download/620-legacy-of-vienna-feminism-and-human-rights?Itemid=>](http://www.cwgl.rutgers.edu/component/docman/doc_download/620-legacy-of-vienna-feminism-and-human-rights?Itemid=>) accessed 11 November 2014.

<sup>351</sup> *ibid.*

<sup>352</sup> UN Women, 'World Conferences on Women' <<http://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women>> accessed 03 June 2015: "The United Nations has organized four world conferences on women. These took place in Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985 and Beijing in 1995. The last was followed by a series of five-year reviews."

of being heard at UN world conferences without deliberate and concerted efforts.”<sup>353</sup> Therefore, it was crucial for “the international women’s movement to build consensus and coalitions to bridge the ideological and material differences between women.”<sup>354</sup> Women’s rights advocates also learned that “[NGOs] have to master lobbying techniques, understand UN conference procedures clearly and lobby effectively during the preparatory process to make an impact on the official debates.”<sup>355</sup> In addition, women’s NGOs had to develop and/or strengthen their substantive and technical skills in the field of research and policy analysis, documentation and communication as well as leadership. To influence decision-makers and official documents, women’s NGOs at the world conferences on women as well as in the ICC negotiations also participated in preliminary drafting work. In addition to lobbying, women’s groups also influenced state delegations by influencing their composition, publishing reports, organising briefings and working with the media. In this way, they bridged NGO and official debates and generated publicity that provided a focus on women worldwide.<sup>356</sup> In this way too, the Vienna, Cairo and Beijing conferences expanded the public space in which women’s groups could work, network and learn.<sup>357</sup>

In the mid-1990s, a Special Rapporteur on Violence against Women, its Causes and Consequences and a Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict were appointed by the United Nations Commission on Human Rights and by the United Nations Sub-Commission on the Promotion and Protection of Human Rights respectively.<sup>358</sup> The appointment of the two Special Rapporteurs is clear evidence of the growing recognition of (sexualised war) violence against women as a serious issue that needs to be addressed at an international level.

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<sup>353</sup> Chen (n 34) 480-481.

<sup>354</sup> Chen (n 34) 481.

<sup>355</sup> *ibid.*

<sup>356</sup> Chen (n 34) 486-489; Rothschild (n 34) 36.

<sup>357</sup> Rothschild (n 34) 36. For information on actors that opposed women’s rights advocates at the Beijing conference see part 9.4.

<sup>358</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 4; United Nations Commission on Human Rights, ‘Special Rapporteur on Violence against Women, its Causes and Consequences’ <<http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx>> accessed 04 June 2015.

The first Special Rapporteur on Violence against Women, its Causes and Consequences, Radhika Coomaraswamy, understood her mandate to cover “all violations of the human rights of women in situations of armed conflict, and in particular, murder, systematic rape, sexual slavery, and forced pregnancy”.<sup>359</sup> Like General Comment No. 19, the DEVAW, the Vienna Conference and the Beijing Platform for Action, Coomaraswamy in her Preliminary Report<sup>360</sup> framed rape in peace and wartime as an issue of discrimination that is linked to power. She stated that rape is a Human Rights violation that is perpetrated because of women’s female sexuality. It can also serve as a means of torture and to humiliate a group. In her 1996 report on violence in the family, Coomaraswamy stated that “[r]ape is broadly [and gender-neutrally] defined as non-consensual intercourse through the use of physical force, threats or intimidation”.<sup>361</sup> In her 1997 report on violence in the community, the Special Rapporteur stressed that “[v]ictim-centred definitions [...] should be broad enough to cover the full range of sexual violence and sensitive enough to capture the problems associated with the possible ‘consent’ of the victim”.<sup>362</sup>

In her Final Report,<sup>363</sup> Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, Gay J McDougall, defined rape as

“the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape.”<sup>364</sup>

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<sup>359</sup> United Nations Commission on Human Rights ‘Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences’ (n 21) para 7.

<sup>360</sup> United Nations Commission on Human Rights ‘Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences’ (n 21).

<sup>361</sup> United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85’ (05 February 1996) UN Doc E/CN.4/1996/53 para 64.

<sup>362</sup> United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy’ (12 February 1997) UN Doc E/CN.4/1997/47 para 159.

<sup>363</sup> United Nations Commission on Human Rights ‘Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict: Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur’ (06 June 2000) UN Doc E/CN.4/Sub.2/2000/21.

<sup>364</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 24.

This definition reflects elaborations and applications of domestic and international law, including definitions of rape that have been developed by the ICTY and ICTR.

The definitions of rape developed within the framework of the UN between the mid-1970s and mid-1990s were increasingly developed by women for women and men as survivors of sexualised violence. While this is considered as progress, framing rape as an issue of protecting women and their fundamental rights and as an issue of discrimination is problematic. As argued in Chapter 2, framing rape as an issue of protecting women rests on, and perpetuates, stereotypes of women as powerless, helpless, vulnerable victims. Framing rape as an issue of discrimination rests on, and perpetuates, a male standard against which women are measured and towards which they should work. These limitations show that ‘adding women and stirring’ does not necessarily and automatically lead to more progressive definitions of sexualised crimes. Instead, it takes people with the right attitude, not the right sex or gender, to develop progressive law.

#### *4.2.6 The International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR)*

The experience and jurisprudence of the *ad hoc* tribunals established by the UN after the war in the former Yugoslavia and the genocide in Rwanda greatly influenced the establishment of the ICC and the negotiations of its instruments. Comparable to the establishment of the ICTY, sexualised war violence against women was addressed from the early stages of the establishment of the ICC. This, however, is contrary to the Rwanda Commission’s focus on the crime of genocide that was also stressed in the UN resolution establishing the ICTR. One possible explanation for this different emphasis is that pressure groups such as NGOs influenced the establishment of the court and tribunals to different degrees. The different degrees of influence NGOs exercised over the ICTY and ICTR also becomes apparent in relation to the drafting of the tribunals’ statutes. NGOs actively participated in the trial stage of cases before the Yugoslavia and Rwanda tribunals by submitting *amicus curiae* briefs. However, they did not impact the definitions of rape developed in *Prosecutor v Jean-Paul Akayesu*, *Prosecutor v Anto Furundžija* and in the indictment of *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Foča case)*. These cases were key precedents in the ICC negotiations regarding the definition of war rape.

#### 4.2.6.1 *The tribunals' establishment*

Responding to the widespread violations of International Humanitarian Law in the former Yugoslavia and Rwanda, the United Nations Security Council (UNSC) created the ICTY and ICTR by resolution.<sup>365</sup> Despite the fact that the same reason was brought forward for the establishment of both tribunals,<sup>366</sup> the respective UNSC resolutions emphasise different aspects of the conflicts. In Resolution 827, which created the ICTY, the UNSC expressed its “grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia [...] including reports of [...] massive, organized and systematic detention and rape of women”.<sup>367</sup> Resolution 955 creating the ICTR states the UNSC’s “grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda”.<sup>368</sup> In contrast to Resolution 827, Resolution 955 does not mention any form of sexualised war violence.

This difference in emphasis in the resolutions reflects the different focal points of the Expert Commissions that were sent to the former Yugoslavia and Rwanda to investigate the situations. While the Yugoslavia Commission focused on sexualised war violence and reported its widespread and systematic use pursuant to orders,<sup>369</sup> the Rwanda Commission concentrated on genocide but referred to war rape as a breach of International Humanitarian Law and as a crime against humanity.<sup>370</sup>

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<sup>365</sup> UNSC Resolution 808 (22 February 1993) UN Doc S/RES/808; UNSC Resolution 827 (n 11); UNSC Resolution 955 (n 11).

<sup>366</sup> UNSC Resolution 808 (n 365) UN Doc S/RES/808; UNSC Resolution 827 (n 11); UNSC Resolution 955 (n 11): The UNSC determined that the widespread violations of International Humanitarian Law that occurred in the former Yugoslavia and Rwanda constituted a threat to international peace and security. The establishment of international tribunals aimed at putting an end to the crimes, applying accountability and contributing to the restoration and maintenance of peace. The goal of the ICTR was also to strengthen the courts and judicial system of Rwanda.

<sup>367</sup> UNSC Resolution 827 (n 11).

<sup>368</sup> UNSC Resolution 955 (n 11).

<sup>369</sup> UNSC ‘Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)’ (27 May 1994) UN Doc S/1994/674: The Yugoslavia Commission consisted of Mr Frits Kalshoven (Netherlands) as chairman, Mr M Cherif Bassiouni (Egypt), Mr William J Fenrick (Canada), Mr Keba M’baye (Senegal) and Mr Torkel Opsahl (Norway). Ms Christine Cleiren (Netherlands) and Ms Hanne Sophie Greve (Norway) acted as replacements for Mr Kalshoven and Mr Opsahl.

<sup>370</sup> Gardam and Jarvis (n 59) 152-153; United Nations, ‘Rwanda – UNAMIR Background’ <<http://www.un.org/en/peacekeeping/missions/past/unamirFT.htm#OCTOBER>> accessed 03 September 2013: The Rwanda Commission consisted of Chairman Mr Atsu-Koffi Amega, former President of the Supreme Court and former Foreign Minister of Togo, Mrs Habi Dieng, Attorney-General of Guinea, and Mr Salifou Fomba, Professor of International Law from Mali and a member of the ILC.



There are several possible explanations for the different focus of the Expert Commissions' work and the UNSC's resolutions despite the perpetration of similar crimes. Against the background of "historical evidence supporting the view that Western legal systems have not treated the rape of black women as seriously as the rape of white women"<sup>371</sup> and the UNSC's agenda for action being "dominated by the interests of Western powers",<sup>372</sup> some argue that the rape of Rwandan women may have been seen as legally less relevant in Western international criminal tribunals than the rape of white Yugoslav women.<sup>373</sup> However, especially when taking into account that the members of the Rwanda Commission were from Togo, Guinea and Mali, this explanation is questionable.

Another reason for the different focus of the Expert Commissions' work and the UNSC's resolutions might be that the killing in Rwanda overshadowed everything else. Here, the large-scale perpetration of sexualised violence only came to attention months later with a rise in pregnancy and birth rates. Therefore, it could be argued that the Commission of Experts did not know to look for sexualised violence.

Thirdly, based on a gendered understanding of the public and private sphere, the role of sexualised violence in both conflicts might have been perceived differently. While in the former Yugoslavia, the perpetration of acts of sexualised war violence was understood to be intimately connected to the overall war effort, to be a crime against a whole community and therefore to have a public dimension, there were no reports of systematic rapes, rape camps or rape orders in Rwanda. Rapes might have been seen as a private problem there.<sup>374</sup>

Fourthly, pressure groups influenced the tribunals to different degrees. By exerting pressure, NGOs played a key role in persuading the UNSC to act in light of the violence spreading in the former Yugoslavia. The detailed documentation and evidence of war crimes provided by NGOs were crucial in the establishment of the ICTY.<sup>375</sup> Human Rights Watch was one of the first NGOs to call for the creation of an international criminal

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<sup>371</sup> Gardam and Jarvis (n 59) 155.

<sup>372</sup> *ibid.*

<sup>373</sup> Copelon, 'Surfacing Gender' n (267) 245-255.

<sup>374</sup> Gardam and Jarvis (n 59) 154-159.

<sup>375</sup> Patrizia De Cesari, 'NGOs and the Activities of the Ad Hoc Criminal Tribunals for Former Yugoslavia and Rwanda' in Alessandro Fodella and others (eds), *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press 2004) 113; Ellis (n 34) 144-146; Emily Haslam, 'Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society' (2011) 5 *International Journal of Transitional Justice* 221.

tribunal for the region. During the conflict, it placed a permanent representative in the former Yugoslavia and conducted investigations and interviews with witnesses. The resulting report<sup>376</sup> influenced the UNSC in its decision to establish an international tribunal.<sup>377</sup> Human Rights Watch's report also contributed to the Expert Commission's findings.<sup>378</sup> In addition, two decades of feminist work to have rape acknowledged as a serious crime<sup>379</sup> resonated with the chairman of the Yugoslavia Commission, M Cherif Bassiouni. He was moved by the reports and challenged by the prospect of clarifying some of the legal questions surrounding sexualised war violence. Therefore, he diverted funds to the investigation of sexualised crimes. Regarding the situation in Rwanda, reports of sexualised violence including war rape and forced marriage mostly came from NGOs, especially from Human Rights Watch<sup>380</sup> and African Rights.<sup>381</sup> However, NGOs and women's activists were less able to exercise influence over the ICTR.<sup>382</sup>

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<sup>376</sup> Human Rights Watch, *War Crimes in Bosnia-Herzegovina* (Human Rights Watch 1992).

<sup>377</sup> De Cesari (n 375) 113; Ellis (n 34) 144.

<sup>378</sup> De Cesari (n 375) 113; Ellis (n 34) 144.

<sup>379</sup> Laura Brunell, 'Feminism' (18 March 2014) *Encyclopaedia Britannica* <<http://www.britannica.com/EBchecked/topic/724633/feminism/280084/Foundations>> accessed 02 April 2015; Groves and Jenainati (n 269) 165- 172; Rebecca Walker, 'Becoming the Third Wave' *Ms. Magazine* (Arlington, January/February 1992) 39-41: Sexualised violence is a central issue for third wave feminists.

The term 'third wave feminism' was coined by Rebecca Walker in an article she published in *Ms Magazine* in 1992. Third wave feminism therefore has its roots in the well-established publishing outlets, but also in women's studies programmes established at universities and long-standing feminist organisations of the second wave. Increasing ease of publishing online in electronic magazines, blogs and videos made the feminist movement and its issues accessible to a wider membership and audience.

According to Laura Brunell, third wave feminists "chose to battle [...] obstacles [presented by sexism, racism and classism] by inverting sexist, racist, and classist symbols, fighting patriarchy with irony, answering violence with stories of survival, and combating continued exclusion with grassroots activism and radical democracy."

Started during the second wave, the trend to become a more inclusive movement in terms of race and sexuality continued. In addition, workplace matters, pornography, gender violence and reproductive rights continued to be prominent issues. Third wave feminists also concerned themselves with issues of language and dress.

Breaking with dichotomous thinking about sex/gender, third wave feminism emphasised the concept of a gender continuum. From this perspective, sex/gender does not have a fixed, intrinsic meaning and there is no self-evident, transparent relationship between them. A person is seen as possessing, expressing and suppressing the full range of masculine and feminine characteristics. For third wave feminists, therefore, sexual liberation included a process of first becoming aware of the ways in which one's sex/gender is socially constructed and then intentionally constructing, and becoming free to express, one's authentic sex/gender identity.

Due to its increasing diversity, critics accuse third wave feminism of lack of cohesion. It is also argued that third wave feminists have nothing of substance to add to the discussion of issues that have remained the same over the course of feminist activism. Extending this claim, some say there is no use of feminism in general anymore.

<sup>380</sup> Human Rights Watch, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and in the Aftermath' (1996) <<http://www.hrw.org/legacy/reports/1996/Rwanda.htm>> accessed 13 August 2013.

#### 4.2.6.2 *The tribunals' statutes*

When drafting the statutes of the *ad hoc* tribunals, the United Nations Office of Legal Affairs sought comments on the drafts from governments and NGOs.<sup>383</sup> Some NGOs were well situated for an international campaign to influence the drafting of the ICTY statute. They were aided by developments in communication technology and increased financial resources. NGOs built on years of organising and training, and drew on extensive scholarship on sexualised war violence and International Law.<sup>384</sup> Transnational networks including the New York-based Women's Coalition against Crimes against Women in the Former Yugoslavia<sup>385</sup> constituted the backbone of the campaign. International women's organisations and activists like the Green/Copelon Group played a key role.<sup>386</sup> They promoted the explicit inclusion<sup>387</sup> of war rape as a war crime, a genocidal act and a grave breach of the Geneva Conventions.<sup>388</sup> The Green/Copelon Group advocated for an informed, gender-neutral understanding of war rape as

“constitute[ing] or [...] constitutive of sexual torture (and their substantive definitions) [to] include:

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<sup>381</sup> African Rights (n 10).

<sup>382</sup> Gardam and Jarvis (n 59) 154-159.

<sup>383</sup> Ellis (n 34) 149: In addition to the Women's Coalition against Crimes against Women in the Former Yugoslavia and the Green/Copelon Group, the American Bar Association, Amnesty International, Human Rights First, the International Committee of the Red Cross and the National Alliance of Women's Organizations each submitted proposals for the ICTY statute.

<sup>384</sup> Mertus, 'When Adding Women Matters' (n 34) 1299-1301.

<sup>385</sup> In 1997, the Women's Coalition against Crimes against Women in the Former Yugoslavia participated in the ICC negotiations as a member of the Women's Caucus.

<sup>386</sup> Patrick Cotter and others, 'Affecting the Rules for the Prosecution of Rape and other Gender-based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique' (1994) 5 Hastings Women's Law Journal 171, 186; Ellis (n 34) 149; Halley, 'Rape at Rome' (n 34) 13; International Human Rights Law Group, 'No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia' (1994) 5 Hastings Women's Law Journal 89, 92, 96-97, 102, 104, 106, 111, 116, 121.

<sup>387</sup> Cotter and others (n 386) 179, 186; Halley, 'Rape at Rome' (n 34) 13; International Human Rights Law Group (n 386) 92, 102, 104, 111, 116, 121.

<sup>388</sup> Cotter and others (n 386) 186; Ellis (n 34) 149; Halley, 'Rape at Rome' (n 34) 13; International Human Rights Law Group (n 386) 92, 96-97, 102, 104, 106, 111, 116, 121.

In addition to the scope of jurisdiction of the ICTY and substantive definitions of sexualised crimes, they also proposed rules for imposing secondary or indirect liability and command liability, standards of evidence for command responsibility, the admissibility of evidence for sexualised crimes, provisions for witness protection, penalties and compensation for victims, equal representation of women, and gender sensitivity training.

[...] a. Rape is any form of forced sexual intercourse. The requisite coercion can be shown through evidence of force, deceit, deprivation, or threats of any of the above, as well as promise of better treatment.  
 b. Rape encompasses a range of non-consensual sexual acts or conduct including the introduction of the penis into the mouth, vagina or anus of the victim or the introduction of other parts of the body or of weapons or objects into the vagina or anus of the victim.  
 c. Rape occurs when there is introduction (described above) to any extent. Proof of rape does not require penetration or the emission of semen.”<sup>389</sup>

Responding to another feminist call, the UN acknowledged the importance of employing female members of staff and experts in gender issues at the ICTY.<sup>390</sup> Amongst others, Florence Ndepele Mwachande Mumba as judge,<sup>391</sup> Louise Arbour as prosecutor<sup>392</sup> and Patricia Viseur Sellers as legal advisor for gender-related crimes and acting senior trial attorney<sup>393</sup> were able to influence the tribunals in regard to the prosecution of sexualised war violence. They also influenced colleagues such as Prosecutor Richard J Goldstone and Appeals Chamber Judge Theodor Meron who were won over for this cause.<sup>394</sup> Judges Almiro Rodrigues and Fouad Riad were also supportive.<sup>395</sup> Incorporating gender expertise in the ICTY’s central operations

“enhanced the ability of prosecutors to bring successful charges against perpetrators of sexual violence. ICTY staff members with gender expertise helped identify witnesses, analyze evidence, elicit testimony, and support those who testified. Equally significant, the inclusion of individuals (male or female) with gender expertise [...] was crucial for building capacity throughout the [Office of the Prosecutor] on related issues.”<sup>396</sup>

In contrast to the influence NGOs exercised on the focus of the Yugoslavia Commission and their active participation in the drafting of the ICTY statute, it appears

<sup>389</sup> Cotter and others (n 386) 192.

<sup>390</sup> Cotter and others (n 386) 220.

<sup>391</sup> International Criminal Tribunal for the Former Yugoslavia, ‘Former Judges’ <<http://www.icty.org/sid/10572>> accessed 15 August 2013.

<sup>392</sup> International Criminal Tribunal for the Former Yugoslavia, ‘Former Prosecutors’ <<http://www.icty.org/sid/101>> accessed 15 August 2013.

<sup>393</sup> — — — — — ‘Patricia Viseur Sellers’ <<http://www.law.umich.edu/workshopsandsymposia/intlworkshopseries/archive/Documents/PViseurSellersCV.pdf>> accessed 15 August 2013.

<sup>394</sup> Askin, *War Crimes against Women* (n 261) 300-301.

<sup>395</sup> Mertus, ‘When Adding Women Matters’ (n 34) 1304.

<sup>396</sup> Mertus, ‘When Adding Women Matters’ (n 34) 1305.

that non-governmental actors were less, if at all, involved in the establishment of the ICTR and the drafting of its statute. This lack of involvement is striking compared to the role NGOs played during the trial phase of cases before the ICTR. It might have been due to issues of access or experience. Those charged with establishing the tribunal might not have supported the participation of NGOs on political grounds, or for reasons of time or expertise. They might not have wanted to share their power with non-state actors who might have wanted to discuss everything democratically with all interested parties, and who might have raised issues and made claims on a moral and idealistic rather than legal basis. Civil society groups might have operated on a local or regional rather than national and international level before. They also might have focused on different areas of advocacy and activism. They might have lacked the resources needed to influence international legal processes. Similar to the situation of Sierra Leone and the Special Court discussed in Chapter 5, Rwandan NGOs might have focused their efforts on the Gacaca courts and/or the Truth and Reconciliation Commission (TRC) rather than the tribunal.

An indication of the success of and for women's advocates and activists in the drafting process of the *ad hoc* tribunals' statutes is the explicit inclusion of rape as a crime against humanity in the ICTY and ICTR statutes,<sup>397</sup> framing rape as a public rather than private issue. In addition, the ICTR statute also explicitly mentions rape as an outrage upon personal dignity under Article 4(e) on violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>398</sup>

If the general qualifications of the categories of crimes are met, war rapes can also be interpreted as acts of violence to life, health and physical or mental well-being,<sup>399</sup> torture or inhuman treatment,<sup>400</sup> causing unnecessary suffering,<sup>401</sup> causing great suffering or serious injury to body or health,<sup>402</sup> and as an inhumane act.<sup>403</sup> War rapes could also be

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<sup>397</sup> UNSC Resolution 827 (n 11) art 5(g); UNSC Resolution 955 (n 11) art 3(g); Christine B Coan, 'Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia' (2000) 26 North Carolina Journal of International Law and Commercial Regulation 183, 187; Fiona de Londras, 'Prosecuting Sexual Violence in the Ad Hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Routledge 2011) 294.

<sup>398</sup> UNSC Resolution 955 (n 11).

<sup>399</sup> UNSC Resolution 955 (n 11) art 4(a).

<sup>400</sup> UNSC Resolution 827 (n 11) art 2(b), art 5(f).

<sup>401</sup> UNSC Resolution 827 (n 11) art 3(a).

<sup>402</sup> UNSC Resolution 827 (n 11) art 2(c).

<sup>403</sup> UNSC Resolution 827 (n 11) art 5(i).

interpreted as genocide by causing serious bodily or mental harm, deliberately inflicting upon the group conditions of life calculated to bring about its physical destruction or imposing measures intended to prevent births within the group.<sup>404</sup> For war rape to be considered under these elements, it has to be taken into account that, on an individual level, war rapes often result in severe physical harm, ranging from bruising and bone fractures to fistulas, vaginal and anal infections, and infertility.<sup>405</sup> Psychologically, the survivor may feel a loss of basic trust, including the sense of identity and self-respect, of security and control. The survivor may feel guilty, ashamed, frustrated and angry. She may not be able to cope with her everyday life and suffer from nightmares, flashbacks, depression, neuroses and post-traumatic stress disorder.<sup>406</sup> Socially, the survivor may face stigmatisation, humiliation and exclusion and is often held responsible for what happened to her.<sup>407</sup> Exclusion from work may make an overall difficult economic post-conflict situation additionally challenging for the survivor. The survivor's family may be faced with excessive demands, separation and violence.<sup>408</sup> On the community level, feelings of

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<sup>404</sup> UNSC Resolution 827 (n 11); UNSC Resolution 955 (n 11).

<sup>405</sup> Claudia Bommert, *Körperorientierte Psychotherapie nach sexueller Gewalt* (PsychologieVerlagsUnion 1993) 58-60; Drakulić (n 8) 180; Nancy Farewell, 'War Rape: New Conceptualizations and Responses' (2004) 19 *Affilia* 389; Michaela Huber, *Trauma und die Folgen: Trauma und Traumabehandlung Teil 1* (2<sup>nd</sup> edn, Junfermann Verlag 2005) 115-117; Ingeborg Joachim, 'Sexualisierte Kriegsgewalt und ihre Folgen' in medica mondiale and Karin Griesse (eds), *Sexualisierte Kriegsgewalt und ihre Folgen: Handbuch zur Unterstützung traumatisierter Frauen in verschiedenen Arbeitsfeldern* (2<sup>nd</sup> edn, Mabuse-Verlag 2006) 63-66; Médecins Sans Frontières, "'I have no joy, no peace of mind': Medical, Psychosocial, and Socio-Economic Consequences of Sexual Violence in Eastern DRC" (Médecins Sans Frontières Holland 2004) <<http://www.msf.org/article/msf-report-i-have-no-joy-no-peace-mind-sexual-violence-eastern-drc-introduction>> accessed 06 September 2012; Médecins Sans Frontières, 'Shattered Lives: Immediate Medical Care Vital for Sexual Violence Victims' (2<sup>nd</sup> edn, Médecins Sans Frontières 2009) 12 <[http://cdn.msf.org.uk/sites/uk/files/Shattered\\_lives\\_June\\_2009\\_200907153528.pdf](http://cdn.msf.org.uk/sites/uk/files/Shattered_lives_June_2009_200907153528.pdf)> accessed 08 July 2013; Anne Warburton, 'Warburton Mission II Report: EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia, Report to EC Foreign Ministers' (1993) 15 <<http://www.womenaid.org/press/info/humanrights/warburtonfull.htm>> accessed 06 September 2012.

<sup>406</sup> Ellen Bass and Laura Davis, *Trotz allem: Wege zur Selbstheilung* (Orlanda Frauenverlag 1991) 34-48; Willi Butollo, Maria Hagl and Marion Krüsmann, *Kreativität und Destruktion posttraumatischer Bewältigung: Forschungsergebnisse und Thesen zum Leben nach dem Trauma* (2<sup>nd</sup> edn, Pfeiffer Verlag 2003) 43-52; Vera Folnegović-Šmalc, 'Psychiatrische Aspekte der Vergewaltigungen im Krieg gegen die Republiken Kroatien und Bosnien-Herzegowina' in Alexandra Stiglmayer (ed), *Massenvergewaltigungen: Krieg gegen die Frauen* (Fischer Taschenbuchverlag 1993) 223-225; Judith Lewis Herman, *Die Narben der Gewalt: Traumatische Erfahrungen Verstehen und Überwinden* (Junfermannsche Verlagsbuchhandlung 2003) 53-76; Joachim (n 405) 66-88; Médecins Sans Frontières, "'I have no joy, no peace of mind'" (n 405) 27; Médecins Sans Frontières, 'Shattered Lives' (n 405) 13.

<sup>407</sup> Médecins Sans Frontières, "'I have no joy, no peace of mind'" (n 405) 31; Médecins Sans Frontières, 'Shattered Lives' (n 405) 13; Diana Milillo, 'Rape as a Tactic of War: Social and Psychological Perspectives' (2006) 21 *Affilia* 196, 199.

<sup>408</sup> Farewell (n 405) 394; Medico International, 'Psychosoziale Arbeit in Gewaltkontexten' in Medico International, *Im Inneren der Globalisierung: Psychosoziale Arbeit in Gewaltkontexten* (Mabuse-Verlag 2005) <<http://www.medico.de/themen/psychosoziales/dokumente/psychosoziale-arbeit-in-gewaltkontexten/1092/>> accessed 06 September 2012.

mistrust and betrayal may lead to the destruction of social networks and disinhibition. War rapes may destroy a group's social structure by making women unmarriageable. In patrilineal societies, pregnancies resulting out of war rape alter the ethnic constitution of a country or region. This summary of potential physical, psychological, social and economic consequences of war rape that impact survivors, their families and their communities illustrates that war rapes causes harm to the physical and mental well-being of a person as well as to life itself, resulting in great and unnecessary suffering. War rapes are (purposefully) intimidating and discriminatory acts. Therefore, if the general qualifications of the categories of crimes are met, war rapes can be interpreted to amount to the crimes mentioned above.

#### 4.2.6.3 *The tribunals' jurisprudence*

Even though the tribunals' statutes explicitly and implicitly include war rape, the elements of the crime were only defined in the tribunals' jurisprudence. In *Prosecutor v Jean-Paul Akayesu*<sup>409</sup> and *Prosecutor v Anto Furundžija*,<sup>410</sup> as well as in the indictment in *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Foča case)*,<sup>411</sup> the Rwanda and Yugoslavia tribunals developed different definitions of rape that were crucial inspiration to the ICC negotiations and therefore will be discussed below.

##### 4.2.6.3.1 *Prosecutor v Jean-Paul Akayesu*

Reflecting the Rwanda Commission's and the UNSC's lack of attention to sexualised war violence in Rwanda, the ICTR initially did not charge Jean-Paul Akayesu with acts of sexualised violence. It was only when witnesses J and H spontaneously testified of rapes they endured and witnessed that Judge Pillay's awareness was raised. She

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<sup>409</sup> *Akayesu* Trial Judgment (n 12).

<sup>410</sup> *Furundžija* Trial Judgment (n 13).

<sup>411</sup> *Foča* Indictment (n 12).

As the *Foča* case had not been decided when the ICC Rome Statute and Elements of Crimes were negotiated, this chapter includes only an analysis of the *Foča* indictment. The judgment is discussed in Chapter 5, which looks that the legislative histories of war rape and forced marriage after the ICC instruments had been completed.

adjourned the proceedings to permit the prosecution to investigate the crimes raised with a view to amend the charges to include war rape.<sup>412</sup> Unclear about who initiated the intervention, this move was supported by critical letters sent to the prosecution by an international NGO coalition comprised of Human Rights Watch and the International Centre for Human Rights and Democratic Development.<sup>413</sup> Furthermore, an *amicus curiae* brief<sup>414</sup> was submitted by the Coalition on Women's Human Rights in Conflict Situations.<sup>415</sup> These interventions followed a report published by Human Rights Watch.<sup>416</sup> Together, these contributions substantiated charges of sexualised violence against Akayesu.<sup>417</sup> Although initially the prosecution under Richard Goldstone did not plan to amend the indictment, it eventually did. It explained that this move was motivated by Witness H's testimony which had already triggered further investigation rather than by the *amicus* brief.<sup>418</sup> Eventually Jean-Paul Akayesu was additionally charged with, and found guilty of, rape and inhumane acts as crimes against humanity.<sup>419</sup>

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<sup>412</sup> Copelon, 'Gender Crimes as War Crimes' (n 59) 224-225.

<sup>413</sup> Cole, 'International Criminal Law and Sexual Violence' (n 59) 54; Copelon, 'Gender Crimes as War Crimes' (n 59) 224-225.

<sup>414</sup> For more information on *amicus curiae* briefs submitted by NGOs to the ICTR and ICTY see Lindblom (n 34) 310-317.

<sup>415</sup> Coalition on Women's Human Rights in Conflict Situations, 'RE: The Prosecutor of the Tribunal against Jean-Paul Akayesu: Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other sexual Violence Within the Competence of the Tribunal' (27 May 1997) <[http://www.iccwomen.org/publications/briefs/docs/Prosecutor\\_v\\_Akayesu ICTR.pdf](http://www.iccwomen.org/publications/briefs/docs/Prosecutor_v_Akayesu ICTR.pdf)> accessed 13 August 2013.

Sarah Williams and Hannah Woolaver, 'The Role of the Amicus Curiae before International Criminal Tribunals' (2006) 6 International Criminal Law Review 151, 161, 170, 174: The Coalition on Women's Human Rights in Conflict Situations also submitted an *amicus* brief to the ICTY in *Prosecutor v Anto Furundžija* which addressed witness rights and thus influenced the prosecution to file motions for a witness' protection. In addition, the Trial Judgment (n 12) also indirectly referred to the *amicus* brief when confirming that therapy is not fact-finding. The Coalition also attempted to exercise influence in *Prosecutor v André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe* before the ICTR in the same way it participated in the Akayesu case. It sought leave to submit an *amicus* brief, requesting the Trial Chamber to call upon the prosecutor to amend the indictment to include charges of sexualised violence. Here, however, the Trial Chamber rejected the Coalition's application. The Trial Chamber explained its decision by saying the prosecutor had indicated at she intended to file a new indictment including rape charges.

<sup>416</sup> Human Rights Watch, 'Shattered Lives' (n 380).

<sup>417</sup> Williams and Woolaver (n 415) 174.

<sup>418</sup> Copelon, 'Gender Crimes as War Crimes' (n 59) 224-225.

<sup>419</sup> Akayesu Amended Indictment (n 12) counts 13-14; Akayesu Trial Judgment (n 12) Verdict: Jean-Paul Akayesu was also charged with, but not found guilty of, outrages upon personal dignity as a war crime under violations of Common Article 3 of the Geneva Conventions.



“[A]s there [was] no commonly accepted definition of this term in international law”,<sup>420</sup> the judges in the *Akayesu* case<sup>421</sup> had to define rape. They followed traditional male legal reasoning processes in the sense that they defined an issue, analysed relevant precedents and recommended a conclusion based on logic and abstraction. However, feminist claims were taken into consideration as sexualised war violence against women was defined as an issue to be legally addressed. Precedents were analysed open-mindedly, making room for the new insights and perspectives generated by new contexts. As commented on below, the final definition is progressive as it is broad, gender-neutral, coercion-based and uses the term ‘invasion’. The judges agreed that “national jurisdictions [define rape] as non-consensual sexual intercourse”.<sup>422</sup> However, a broader definition was warranted to include “variations on the act of rape [...] which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual”.<sup>423</sup> Comparing the definition of rape to that of torture as stated in the Torture Convention, “[t]he Chamber consider[ed] that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.”<sup>424</sup> Rather than cataloguing specific acts in the definition of rape, a focus should be placed on the conceptual frame of the violent act.<sup>425</sup> While Prosecutor Goldstone in the indictment referred to “forcible sexual penetration”,<sup>426</sup> the Trial Chamber arrived at a definition where rape was understood as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.<sup>427</sup> This broad and gender-neutral definition supports the understanding that no genuine consent to sexual contact is possible under coercive circumstances. Emphasising the element of coercion, the nature of the crime is understood as a crime of inequality of force, physical power, status or relationship. Consequently, the focus lies on power, domination and violence. The physical acts, surrounding contexts and the exploitation of a situation are emphasised. The relevant

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<sup>420</sup> *Akayesu* Trial Judgment (n 12) para 596.

<sup>421</sup> *Akayesu* Trial Judgment (n 12): The Trial Chamber judges were Laïty Kama, Lennart Aspegren and Navanethem Pillay.

<sup>422</sup> *Akayesu* Trial Judgment (n 12) para 596.

<sup>423</sup> *Akayesu* Trial Judgment (n 12) para 596.

<sup>424</sup> *Akayesu* Trial Judgment (n 12) para 597.

<sup>425</sup> *ibid.*

<sup>426</sup> *Akayesu* Amended Indictment (n 12) para 10A.

<sup>427</sup> *Akayesu* Trial Judgment (n 12) para 598.

events are framed in a social, contextual and collective way;<sup>428</sup> social in the sense that they are interpersonal and related to society and its organisation, contextual in the sense that they relate to, or depend on, context, collective in the sense that they are facilitated by people acting as a group, for example society. Therefore, coercion-based definitions of rape highlight that rape is a crime of violence for which the survivor is not responsible. In addition to disconnecting rape and consent, the *Akayesu* definition detaches rape and honour by overcoming the male and perpetrator-centred notion of penetration.<sup>429</sup> Traditionally, the concept of penetration relates to the insertion of the man's penis into an orifice of the victim's body. Therefore, it focuses on the physical aspect of rape. However, it excludes other sexual assaults like forced sexual acts involving objects that are equally serious to penetration with the penis.<sup>430</sup> A rape definition using the term 'invasion', in contrast, provides a gender-neutral definition that illustrates the survivor's point of view.<sup>431</sup> It is more comprehensive than a rape definition using the term 'penetration' as it encompasses a wider range of acts of sexualised violence. Therefore, 'invasion' keeps the definition open so as to be inclusive.<sup>432</sup> A rape definition using the term 'invasion' emphasises violence and subordination rather than sexual arousal.<sup>433</sup> It indicates that war rape does not only cause physical, but also psychological harm. Rape is an invasion into a person's autonomy, self-determination and integrity.<sup>434</sup> Consequently, a rape definition using the term 'invasion' captures the nature of the crime more adequately. It also enables

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<sup>428</sup> Centre on Law and Globalization, 'What Counts as Rape in International Crimes?' <[http://clg.portalxm.com/library/keytext.cfm?keytext\\_id=182](http://clg.portalxm.com/library/keytext.cfm?keytext_id=182)> accessed 27 October 2012.

<sup>429</sup> Human Rights Watch, 'Commentary on the Second Preparatory Commission on Rules of Procedure and Elements of Crime' (n 3); United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3) para 24; for further discussion of using the term 'penetration' in defining rape see sections 1.2.2, 2.2.1 and 7.2.4.3.

<sup>430</sup> Interview 9 (11 April 2014); Women's Caucus for Gender Justice, 'Priority Concerns Related to the Elements Annex' (February 1999) <<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/021999pc/pconcerns.htm>> accessed 22 January 2014.

<sup>431</sup> Boon (n 47); Brouwer (n 9) 107.

<sup>432</sup> Interview 10 (22 April 2014).

<sup>433</sup> PrepCom2 'Proposal Submitted by Costa Rica on Elements of Crimes' (24 February 1999) UN Doc PCNICC/1999/WGEC/DP.6.

<sup>434</sup> Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (n 3) 778.

survivors and witnesses to speak about rape without having to use words that may be culturally forbidden.<sup>435</sup>

In addition to developing the first international legal definition of war rape, the ICTR further elaborated that “[l]ike torture, rape [can be] used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”<sup>436</sup> Utilising a somewhat patriarchal lens, the tribunal also determined that war rapes can destroy a group by preventing births and therefore constitute acts of genocide if the qualifying elements are met.<sup>437</sup> This conveys a multidimensional view of women as individuals, members of a group and having a reproductive role.<sup>438</sup>

#### 4.2.6.3.2 *Prosecutor v Anto Furundžija*

Disregarding the *Akayesu* case, the ICTY judges Florence Ndepele Mwachande Mumba, Antonio Cassese and Richard May in *Prosecutor v Anto Furundžija* stated that “[n]o definition of rape can be found in international law”.<sup>439</sup> The Trial Chamber noted the unchallenged submission of the prosecution team of Brenda Hollis, Patricia Viseur Sellers and Michael Blaxill that

“rape is a forcible act[,] [...] accomplished by force or threats of force against the victim or a third person[.] [...] This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.”<sup>440</sup>

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<sup>435</sup> Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 778; Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for the Elements Annex’ (July 1999) <<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/071999pc/elements.htm>> accessed 22 January 2014.

<sup>436</sup> *Akayesu* Trial Judgment (n 12) para 597.

<sup>437</sup> *Akayesu* Trial Judgment (n 12) para 507-508; Genocide Convention (n 28) art 2(d); UNSC Resolution 955 (n 11) art 2(2)(d).

<sup>438</sup> de Londras (n 397) 297.

<sup>439</sup> *Furundžija* Trial Judgment (n 13) para 175.

<sup>440</sup> *Furundžija* Trial Judgment (n 13) para 174.

However, the Trial Chamber decided to “look for principles of criminal law common to the major legal systems of the world”,<sup>441</sup> for the “common denominators”,<sup>442</sup> derived from national laws. As a reason it stated that “no elements other than those emphasised [in Article 27 of the fourth Geneva Convention, Article 76(1) of Additional Protocol I and Article 4(2)(e) of Additional Protocol II as well as in the *Akayesu* case] may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail.”<sup>443</sup> Like in the *Akayesu* case, the judges in the *Furundžija* case followed male legal reasoning processes. However, they seemingly were more cautious in their analysis of precedents and in their recommended conclusion. The Trial Chamber

“found that although the laws of many countries specify that rape can only be committed against a woman, others provide that rape can be committed against a victim of either sex. The laws of several jurisdictions state that the *actus reus* of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ. There are also jurisdictions which interpret the *actus reus* of rape broadly. [...] Furthermore, all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless. Some jurisdictions indicate that the force or intimidation can be directed at a third person.”<sup>444</sup>

Faced with a lack of uniformity regarding the criminalisation of forced oral penetration,<sup>445</sup> the Trial Chamber held that it “constitutes a most humiliating and degrading attack upon human dignity”.<sup>446</sup> Charging it as rape rather than sexual assault would be in conformity with the principle of *nullum crimen sine lege* since forcible oral sex is a crime.<sup>447</sup> Based on these elaborations, the Trial Chamber arrived at a more specific, mechanical and male definition of the objective elements of rape that is very similar to the definition proposed by the prosecution. The *Furundžija* definition of rape describes the crime as

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<sup>441</sup> *Furundžija* Trial Judgment (n 13) para 177.

<sup>442</sup> *Furundžija* Trial Judgment (n 13) para 178.

<sup>443</sup> *Furundžija* Trial Judgment (n 13) para 177.

<sup>444</sup> *Furundžija* Trial Judgment (n 13) para 180.

<sup>445</sup> *Furundžija* Trial Judgment (n 13) para 182.

<sup>446</sup> *Furundžija* Trial Judgment (n 13) para 183.

<sup>447</sup> *Furundžija* Trial Judgment (n 13) para 184.

“(i) the sexual penetration, however slight:  
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or  
(b) of the mouth of the victim by the penis of the perpetrator;  
(ii) by coercion or force or threat of force against the victim or a third person.”<sup>448</sup>

The ICTY noted that,

“[i]n stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim”.<sup>449</sup>

Furthermore, the *Furundžija* definition does not consider situations where a person is “put in a state of being unable to resist, [...] particularly vulnerable or incapable of resisting because of physical or mental incapacity, or [...] induced into the act by surprise or misrepresentation.”<sup>450</sup> Therefore, in this respect, the *Furundžija* definition is “more narrowly stated than is required by international law.”<sup>451</sup> This outcome is interesting considering Judge Mumba’s and Prosecutor Viseur Sellers’ expertise in gender crimes and advocacy for women’s Human Rights,<sup>452</sup> and the availability of the Green/Copelon and *Akayesu* definition.

#### 4.2.6.3.3 *The indictment in Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Foča case)*

The *Foča* case was the first ICTY trial to exclusively deal with charges of sexualised violence. The core of the *Foča* team consisted of Prosecutor Hildegard Uertz-Retzlaff, Lawyer Peggy Kuo and Crime Analyst Tejshree Thapa. They were later joined by

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<sup>448</sup> *Furundžija* Trial Judgment (n 13) para 185.

<sup>449</sup> *Foča* Trial Judgment (n 19) para 438.

<sup>450</sup> *Foča* Trial Judgment (n 19) para 446.

<sup>451</sup> *Foča* Trial Judgment (n 19) para 438.

<sup>452</sup> Askin, ‘Prosecuting Wartime Rape’ (n 282) 331; Kelly Dawn Askin, ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’ (1999) 93 *American Journal of International Law* 97, 111; Mertus, ‘When Adding Women Matters’ (n 34) 1309.

Prosecutor Dirk Ryneveld and Lawyer Daryl Mundis. The *Foča* team was supported by Patricia Viseur Sellers, Prosecutor Nancy Paterson and the ICTY Victims and Witness Unit.<sup>453</sup> Demonstrating sensitivity for issues of gender and culture, the *Foča* team worked to build trusting and confidential relationships with the witnesses from the beginning. They portrayed an informed understanding of war violence against women as being interdependent with issues of gender, power and fear. Nevertheless, they aimed to build a thematic case that reflected the organised way in which war rape was used as a method of ethnic cleansing rather than trying single individuals for isolated rapes.<sup>454</sup> Following this approach, the accused were charged with individual and/or command responsibility for committing war crimes and crimes against humanity of rape, torture, enslavement and other violations of personal dignity.<sup>455</sup> Similar to the *Furundžija* definition, the *Foča* indictment defines rape as

“acts of forcible sexual penetration of a person, or forcing a person to sexually penetrate another [...]. Sexual penetration includes penetration, however slight, of the vagina, anus or oral cavity, by the penis. Sexual penetration of the vulva or anus is not limited to the penis. Such acts can constitute an element of a crime against humanity, (enslavement under Article 5(c), torture under Article 5(f), rape under Article 5(g)), violations of the laws and customs of war, (torture under Article 3 and Article 3(1)(a) of the Geneva Conventions) and a grave breach of the Geneva Conventions, (torture under Article 2 (b)).”<sup>456</sup>

While the indictment indicates that the sexualised crimes dealt with in the case were committed under coercive circumstances,<sup>457</sup> the third amended indictment makes it explicit. It states that

“[i]n all counts charging sexual assault, the victim was subjected to or threatened with or had reason to fear violence, duress, detention or psychological oppression, or reasonably believed that if she did not submit, another might be so subjected, threatened or put in fear.”<sup>458</sup>

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<sup>453</sup> See Hagen (n 34) for more information on the *Foča* team.

<sup>454</sup> Hagen (n 34) 176-203.

<sup>455</sup> *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Third Amended Indictment (Kunarac and Kovač)) IT-96-23-PT “*Foča* case” (08 November 1999).

<sup>456</sup> *Foča* Indictment (n 12) para 4.8.

<sup>457</sup> *Foča* Indictment (n 12) para 1.2, para 1.4, para 6.4, para 6.11, para 7.5, para 10.7.

<sup>458</sup> *Foča* case Third Amended Indictment (n 455) para 4.8.

In addition to demonstrating that rape was used as a form of torture, the *Foča* indictment also establishes a link between rape, enslavement and outrages upon personal dignity. The accused were charged with detaining women in houses where the women were treated as their captors' personal property and forced to sexually serve their captors as well as to perform household tasks.<sup>459</sup> The women "were also beaten, threatened, psychologically oppressed, and kept in constant fear."<sup>460</sup> This highlights the coercive circumstances the women experienced. In the eyes of the prosecution, the fact that the women "were not guarded or locked inside the house"<sup>461</sup> did not make a difference as they "could not escape. They had no-where to go as they were surrounded by Serbs".<sup>462</sup> In the third amended indictment, this conduct was charged as the war crime and crime against humanity of rape, the crime against humanity of enslavement and the war crime of committing outrages upon personal dignity.<sup>463</sup> In the first indictment, however, the accused are not charged with rape as a war crime, but it included for one instance an additional charge of inhuman treatment constituting a grave breach of the Geneva Conventions.<sup>464</sup>

#### *4.2.7 Relevant national definitions of rape*

In addition to international legal definitions of rape, certain national definitions were of relevance to the ICC negotiations.

The Arab block's national rape definitions demonstrate a divergent understanding of rape. Some states define rape progressively as a form of sexual assault and recognise coercion as an element. Other states in contrast understand rape as an honour crime, define it using the term 'penetration' and stress the absence of consent of the survivor. However, the individual states constituting the Arab block do not clearly advance a more progressive or more conservative understanding of rape. Their national rape definitions combine progressive and conservative elements. Iraq, for example, defines rape as sexual intercourse without consent but also advances an element of force while still generally

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<sup>459</sup> *Foča* case Third Amended Indictment (n 455) para 10.3.

<sup>460</sup> *Foča* case Third Amended Indictment (n 455) para 11.2.

<sup>461</sup> *Foča* Indictment (n 12) para 10.2.

<sup>462</sup> *ibid.*

<sup>463</sup> *Foča* case Third Amended Indictment (n 455) counts 14-25.

<sup>464</sup> *Foča* Indictment (n 12) counts 56-59.

framing rape as an honour crime. Sudan advances a definition of rape as intercourse without consent. Similarly, Bahrain understands rape as sexual assault without consent.<sup>465</sup>

Other national legislation such as the 2000 Colombian Penal Code includes the crime of violent carnal access<sup>466</sup> which includes rape. Even though the Colombian Penal Code does not define rape itself, rape is understood as penetration by the penis,<sup>467</sup> ignoring the use of other body parts and objects.

Similarly, the US Federal Bureau of Investigation's definition of rape that was in use during the ICC negotiations reads: "The carnal knowledge of a female forcibly and against her will."<sup>468</sup> Like some of the national rape definitions advanced by states constituting the Arab block, the United States defined rape in terms of coercion and absence of consent here. Moreover, it focused on the rape of women and ignored offenses involving oral or anal invasion, the use of objects and rapes of men. A previous US definition that remains a point of reference in discussions on how to define war rape can be found in the Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (Lieber Code).<sup>469</sup> Article 44 explicitly prohibits war rape as an act of wanton – not systematic – violence punishable as a capital crime. It places war rapes in context with the destruction and unlawful taking of property, as well as with other acts of violence like "wounding, maiming, or killing".

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<sup>465</sup> Bahrain Penal Code (n 20) art 344, art 346; The Criminal Act of 1991 (Sudan) (n 20) art 149(1); Iraqi Penal Code No. 111 (n 20) art 21(1)(f), art 393(1); The Libyan Penal Code (n 20) art 407; Omani Penal Code (n 20) art 218(1); Qatari Penal Code (n 20) art 279; Centre on Law and Globalization (n 428); Khalaf (n 20) 6; United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3) para 24; U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, '2009 Human Rights Report: Saudi Arabia' (n 20); U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, '2009 Human Rights Report: Syria' (n 20).

The Arab block's national laws also became relevant in the ICC discussion of forced marriage. A detailed examination can be found in Chapter 9.

<sup>466</sup> Ley No 599 de 2000 Por la cual se expide el Código Penal (24 July 2000) (Colombia) (n 20) art 205.

<sup>467</sup> Interview 2 (24 March 2014); Interview 7 (04 April 2014).

<sup>468</sup> Federal Bureau of Investigation (n 20): The current definition is: "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."

<sup>469</sup> Lieber Code (n 261); Viseur Sellers, 'The Context of Sexual Violence' (n 59) 271-273.



### 4.3 Forced marriage

Whereas international agreements mentioned war rape from the early 20<sup>th</sup> century on, forced marriage in general only began to be referred to in the late 1940s. An increased respect for Human Rights after the Second World War, together with the rise of second wave feminism in the late 1960s, may have contributed to the inclusion of marriage rights in international Human Rights instruments. The slogan ‘the personal is political’ referred to the fact that every part of a woman’s private life, for example marriage, is affected by, and at the same time can affect, the political situation, for example domestic norms and rules regarding marriage.

International agreements like the UDHR,<sup>470</sup> the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,<sup>471</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>472</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>473</sup> and CEDAW<sup>474</sup> highlight that consent of both intending spouses is crucial for a marriage. Article 10(1) of the ICESCR furthermore states that “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment”.<sup>475</sup> Following this understanding of family as the basis of a social order, even the more patriarchal international community should have an interest in criminalising forced marriage. If the basis of a social order, the family, is established by force, these coercive circumstances may have destabilising effects on a whole social order.

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 condemns slavery-like practices, including bride sale and wife inheritance which include elements of coercion.<sup>476</sup> It calls on states to abolish

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<sup>470</sup> UDHR (n 128) art 16(2).

<sup>471</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (07 November 1962) 521 UNTS 231 art 1(1).

<sup>472</sup> ICCPR (n 99) art 23(3).

<sup>473</sup> ICESCR (n 99) art 10(1).

<sup>474</sup> CEDAW (n 97) art 16.

<sup>475</sup> ICESCR (n 99).

<sup>476</sup> Supplementary Slavery Convention (n 128) art 1(c).

“[a]ny institution or practice whereby:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person”.

The UN Special Rapporteur on Violence against Women, its Causes and Consequences, Radhika Coomaraswamy, referred to forced marriages in her reports from 1995 onwards. In the context of outlining the nature of abuse that refugees and displaced women face, she commented in a footnote that “[t]he existing bank of jurisprudence on the meaning of persecution includes rape but does not include, for example, [...] forced marriage”.<sup>477</sup> The Special Rapporteur also mentioned forced marriage in the context of outlining the international legal framework governing trafficking and forced prostitution<sup>478</sup> as well as in relation to cases of war violence against women from Rwanda,<sup>479</sup> Algeria,<sup>480</sup> Kashmir<sup>481</sup> and East Timor.<sup>482</sup> However, she did not go into any detailed discussion.<sup>483</sup>

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— — ‘The Woman’s Rights Movement’ <<http://utc.iath.virginia.edu/abolitn/wmhp.html>> accessed 03 April 2015; Groves and Jenainati (n 269); National Women’s History Museum, ‘The Abolition Movement and Woman Suffrage’ (2007) <<https://www.nwhm.org/online-exhibits/rightsforwomen/abolitionandsuffrage.html>> accessed 03 April 2015: In the Anglo-speaking world of the 17<sup>th</sup> and 18<sup>th</sup> century, slavery was linked to women’s status and marriage and the fight for women’s rights was equated with the abolitionist cause. This is demonstrated, for example, in Lady Mary Chudleigh’s poem *To the Ladies* (1703) and in Elizabeth Cady Stanton’s 1860 speech before the New York Legislature where she said: “The negro’s skin and the woman’s sex are both prima facie evidence that they were intended to be in subjection to the white Saxon man.” By being actively involved in the abolitionist movement, the early leaders of the women’s movement learned how to organise, publicise and articulate a political protest. Women wrote articles for papers; circulated pamphlets; circulated, signed and delivered petitions; and made speeches to mixed male and female audiences. However, their male fellow campaigners did not always welcome women playing active roles or taking speaking parts. Efforts to silence women at anti-slavery conventions in the US and UK influenced Elizabeth Cady Stanton and Lucretia Mott to hold the first women’s rights convention at Seneca Falls, New York, in June 1848. One of the tenets declared at the first and subsequent women’s rights conventions was that, in a way, women were slaves too. Women active in the abolitionist movement began to see some legal similarities between their situation and that of slaves. Taking the historic link between slavery and women’s rights and their status into consideration, the categorisation of forced marriage as a form of (sexual) slavery may have deeper historical roots. In her book *Blood Rites: Origins and History of the Passions of War* (Virago 1997), Barbara Ehrenreich suggested that they go even further back than the 17<sup>th</sup> century. She argued that in the Ancient Middle East, war made men predators and women slaves.

<sup>477</sup> United Nations Commission on Human Rights ‘Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences’ (n 21) fn 228.

<sup>478</sup> United Nations Commission on Human Rights ‘Report on the Mission of the Special Rapporteur to Poland’ (n 23) para 77-78, para 84.

<sup>479</sup> United Nations Commission on Human Rights ‘Report of the Mission to Rwanda on the Issues of Violence against Women in Situations of Armed Conflict, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44’ (04 February 1998) UN Doc E/CN.4/1998/54/Add.1.

In her Final Report, Gay J McDougall, the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, recognised forced marriage as “situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors.”<sup>484</sup> Despite this recognition and awareness of both the sexual and non-sexual elements of forced marriage, however, the Special Rapporteur defined forced marriage as a form of sexual slavery.<sup>485</sup>

#### *4.4 Conclusion*

Chapter 4 situated the ICC negotiations within the broader context of legal discussions and developments regarding war rape and forced marriage in times of armed conflict. It retraced the pre-ICC legislative histories of the two crimes respectively, establishing the background against which the ICC negotiations of the definitions of war rape and forced marriage took place.

Outlining the international legal developments regarding the crime of war rape demonstrates that bilateral and multilateral conventions concluded in the 18<sup>th</sup>, 19<sup>th</sup> and early 20<sup>th</sup> century were early attempts at the criminalisation of war rape. They saw it as an honour crime. International agreements of the early and mid-20<sup>th</sup> century as well as the international military tribunals established after the Second World War retained this understanding. The IMT and IMTFE also categorised war rape as inhuman treatment and

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<sup>480</sup> United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44’ (n 21) para 17, para 23.

<sup>481</sup> United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44’ (n 21) para 17, para 36.

<sup>482</sup> United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44’ (n 21) para 27.

<sup>483</sup> Interview 19 (26 November 2014): It was suggested that the Special Rapporteur on Violence against Women, its Causes and Consequences might have developed the term ‘forced marriage’ and influenced the ICC negotiations of the crime as she personally discussed gender issues with other actors involved.

<sup>484</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 30.

<sup>485</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 30; See Chapter 8 for further discussion of the Final Report.

mistreatment. In the period from the mid-1970s to the mid-1990s, international agreements and documents moved away from an honour-based view of rape and towards an understanding that it is a gender-based violation of women's integrity. A link was established between everyday discrimination against, and disadvantages of, women, and the general vulnerability of women in wartime. War rape was framed as an issue of protecting women and their fundamental rights as well as an issue of discrimination. This constitutes the context in which the negotiations for the establishment of an international criminal court began. At a time when the Rome Statute had been passed and the discussion of the Elements of Crimes was underway, the statutes of the ICTR and ICTY explicitly included war rape as a crime against humanity. In addition, the ICTR statute explicitly mentioned rape as an outrage upon personal dignity, constituting a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The tribunals' jurisprudence defined war rape as a crime against humanity, a war crime, as constituting torture, an act of genocide and a grave breach of the Geneva Conventions. Examining the definitions of rape as such, the ICTR's and ICTY's jurisprudence reveals different perspectives on the element of invasion/penetration. While the *Akayesu* definition uses the term 'invasion', 'penetration' is used in the *Furundžija* case and the *Foča* indictment. The latter reflect most national rape definitions. Oddly, the ICC uses both the term 'invasion' and 'penetration'.

While the ICC negotiations could draw on a fairly extensive legislative history in defining war rape, forced marriage in times of armed conflict was less well-theorised and well-established at that time. Bilateral and multilateral conventions form early attempts at the criminalisation of war rape. However, similar steps were not taken regarding forced marriage in times of armed conflict. While international agreements mentioned war rape from the early 20<sup>th</sup> century on, forced marriage in general only began to be referred to in the late 1940s. From the mid-1960s on, international Human Rights instruments highlight that consent of both intending spouses is crucial for a marriage. From 1995 onwards, the UN Special Rapporteur on Violence against Women, its Causes and Consequences directly addressed forced marriage in the context of persecution, trafficking and forced prostitution as well as in the context of armed conflict. However, a detailed discussion and definition remained missing. Similar to the developments of a definition of war rape, the first definition of forced marriage in times of armed conflict was put forward at a time when the Rome Statute had been passed and the discussion of the Elements of Crimes had begun.

The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict found the constituting elements of forced marriage to include being forced into a conjugal relationship, forced labour and acts of sexualised violence.

## **5 The post-ICC legislative histories of war rape and forced marriage**

### *5.1 Introduction*

After Chapter 4 focused on the pre-ICC legislative histories of war rape and forced marriage, analysing and assessing the understanding of the two crimes that existed at the time of the ICC negotiations, Chapter 5 focuses on legal discussions and developments that took place after the negotiations of the Rome Statute and the Elements of Crimes were completed. It also discusses theoretical considerations regarding the causes and meanings of war rape and forced marriage. Even though the case reports and theories discussed in Chapter 5 had no bearing on the ICC negotiations in the 1990s, their analysis is crucial for a broader contextualisation of the crimes of war rape and forced marriage. Case reports and theories discussed in Chapter 5 include some of the key discussions regarding the two crimes and inform their current understanding. They form the background against which the present researcher assesses their definitions. Especially the crime of forced marriage in times of armed conflict cannot be understood and analysed without taking into consideration cases dealt with by the SCSL from 2003 onwards as they were the first cases to discuss forced marriage as a crime. They addressed realities of conflicts that were ongoing while the ICC instruments were negotiated<sup>486</sup> and would likely be considered by the court.<sup>487</sup> Considering the influence the ICTY and ICTR precedents had on the ICC negotiations in the 1990s, later jurisprudence of the Yugoslavia Tribunal and the SCSL may have an impact on future reviews of the ICC instruments. Therefore it is a valuable consideration to further the comprehensive nature of this research.

Chapter 5 is divided into two parts. The first one focuses on war rape, the second one on forced marriage. The part on war rape first discusses theoretical considerations regarding the causes and meanings of the crime. Arguments are considered that explain the perpetration of war rapes as an expression of natural male aggressiveness, power, patriarchy and social interactions in the military. Furthermore, interpretations of war rape as a weapon of war and a propaganda tool are examined. After these theoretical considerations, the *Foča* judgment is discussed as it introduces an element of consent into the definition of war rape. This is contrary to the coercion-based rape definition set out in

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<sup>486</sup> Carlson and Mazurana (n 6); Women Under Siege, 'Liberia' (n 6); Women Under Siege, 'Sierra Leone' (n 6).

<sup>487</sup> International Criminal Court, 'Situations and Cases: Uganda' (n 7).

the *Foča* indictment discussed in Chapter 4. The *Foča* case is also instrumental in the second part of this chapter dealing with forced marriage as it served as a precedent for cases involving forced marriage considered by the SCSL. In the *Foča* case, the ICTY developed a broad, gender-neutral definition of enslavement and listed factors to be taken into consideration in determining whether or not powers attaching to the right of ownership were exercised. As such, the *Foča* judgment guided judges in the SCSL in determining whether acts of forced marriage can be interpreted as an exercise of powers attaching to the right of ownership. If so, forced marriage can be understood as an act of sexual slavery. Indeed, in *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (AFRC case), *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (RUF case) and *Prosecutor v Charles Taylor*, the SCSL categorised forced marriage as a form of sexual slavery and also as an inhumane act. Evidence of forced marriage was also heard in relation to charges of acts of terror and outrages upon personal dignity. Reflecting these different categorisations, the Special Court referred to the crime as ‘forced marriage’ and ‘conjugal slavery’. By elaborating on its understanding of forced marriage, the SCSL contributed to the theorisation of the crime, its causes and meanings. In Chapter 5, the SCSL’s elaborations on the causes and meanings of forced marriage are supplemented with more theoretical considerations, many of which draw on examples from Uganda. They explain that forced marriages are formed in times of armed conflict to create dependency structures in fighting groups as well as to destroy traditional interpersonal bonds. Tim Allen and Mareike Schomerus<sup>488</sup> as well as Sophie Kramer<sup>489</sup> furthermore argued that forced marriage, like war rape, is based on accepted peacetime marriage practices that are pushed into the context of conflict. In addition, Khatidja Chantler<sup>490</sup> as well as Catherine Dauvergne and Jenni Millbank<sup>491</sup> argued that forced marriage is a means to exercise control over someone’s sexuality. It is understood as a reward and a status symbol. Chapter 5 also advances a new understanding of forced marriage based on the theory of hegemonic

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<sup>488</sup> Tim Allen and Mareike Schomerus, ‘A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda: An Independent Study’ (2006) 23-24 <[http://pdf.usaid.gov/pdf\\_docs/PNADI241.pdf](http://pdf.usaid.gov/pdf_docs/PNADI241.pdf)> accessed 08 July 2013.

<sup>489</sup> Sophie Kramer, ‘Forced Marriage and the Absence of Gang Rape: Explaining Sexual Violence by the Lord’s Resistance Army in Northern Uganda’ (2012) 23 (1) Columbia University Journal of Politics and Society 11, 26-28.

<sup>490</sup> Khatidja Chantler, ‘Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse’ (2012) 13 Trauma, Violence and Abuse 176, 177.

<sup>491</sup> Catherine Dauvergne and Jenni Millbank, ‘Forced Marriage as a Harm in Domestic and International Law’ (2010) 73 Modern Law Review 57.

masculinity. Following this, forced marriage in times of armed conflict can be understood as a way to fulfil a certain norm of masculinity that cannot be achieved otherwise. Based on this understanding, other explanations of the causes and meanings of forced marriage as well as the understanding of it being a form of sexual slavery are critiqued. The conclusion of Chapter 5 draws together the understanding of war rape and forced marriage for the purpose of this thesis.

Like Chapter 4, Chapter 5 offers a constructivist approach to the legislative histories of war rape and forced marriage. It refers to the main actors in this process (Research Question 1), paying particular attention to the role of NGOs (Hypothesis 1). Chapter 5 also takes into consideration what influenced the actors (Research Question 2), how they understood the crimes of war rape and forced marriage (Research Question 3), and how they influenced their definitions (Research Question 4). However, an in-depth analysis of the mutually shaped normative structures and actors is beyond the scope of this chapter as it would be too comprehensive.

## *5.2 Theoretical considerations regarding the causes and meanings of war rape*

The following paragraphs consider arguments explaining the perpetration of acts of war rapes as expressions of natural male aggressiveness, power, patriarchy and social interactions in the military. Furthermore, interpretations of war rape as a weapon of war and a propaganda tool are examined.

When discussing the causes and meanings of war rape, it needs to be kept in mind that they are perpetrated in the context of other acts of war violence committed by soldiers and civilians against civilians.<sup>492</sup> Moreover, it is important to stress that the causes and meanings of war rape are context-dependent,<sup>493</sup> complex and interconnected. No single cause determines acts of war rape. The following paragraphs outline individual,

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<sup>492</sup> Elisabeth Jean Wood, 'Conflict-Related Sexual Violence and the Policy Implications of Recent Research' (2015) International Review of the Red Cross/ FirstView Article 1 <<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9579578&fileId=S1816383115000077>> accessed 06 May 2015.

<sup>493</sup> Seifert (n 8).



interpersonal, institutional and structural causes, framing war rape as a form of interpersonal, social, political and economic violence.<sup>494</sup>

Historically, the perpetration of sexualised violence against women<sup>495</sup> in peace and wartime was ascribed to individual causes in the form of a natural male aggression, the physical superiority of men to women and an uncontrollable male sexual desire. This argument is connected to the assumption that war rapes are an unavoidable part, a by-product of every war, granted to the victor as a reward.<sup>496</sup> Consequently, it abets impunity and neutralises the conduct.<sup>497</sup> This indicates that structural causes such as policies of impunity may explain the perpetration of war rapes.

Contrasting these supposedly natural male dispositions with constructivist arguments, rape can be explained to have interpersonal and structural causes. Therefore, it

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<sup>494</sup> Caroline O N Moser, 'The Gendered Continuum of Violence and Conflict: An Operational Framework' in Fiona Clark and Caroline N O Moser (eds), *Victims, Perpetrators Or Actors? Gender, Armed Conflict and Political Violence* (Zed 2001) 39-40: Individual causes of violent crimes relate to "[p]ersonal history and biophysical make-up; ontogenetic factors of an individual's development such as personality that shape responses to interpersonal and institutional stressors". Interpersonal causes include "[i]nterpersonal gender relations between individuals within families or households, as well as intimate or acquaintance relationships". Institutional causes of war rape highlight the role of "[f]ormal and informal gendered/non-gendered institutions and organizations; social networks in which gender relations are embedded". Structural causes stress the relevance of "macro-level political, economic, and social structure and policy environment, including the cultural gender norms and ideology that permeates society".

<sup>495</sup> Bourke (n 294) 361-362; Brownmiller, *Against Our Will* (n 59) 48-49; Janie L Leatherman, *Sexual Violence and Armed Conflict* (Polity Press 2011) 1, 157; Inger Skjelsbeak, 'Sexual Violence and War: Mapping Out a Complex Relationship' (2001) 7 *European Journal of International Relations* 211, 215, 225-226: Women are readily seen as victims of sexualised war violence and men as perpetrators. However, it has to be stressed that this is not always the case. The rape of men by other men in times of war and peace is an exertion of power and control by feminising the victim and masculinising the perpetrator. Considering that war rapes do not only target one individual but also the group he belongs to, groups of people are feminised or masculinised. Gendering groups becomes a way of ascribing power to warring parties. Masculinised identities are ascribed power while feminised identities are not, situating both in a hierarchical power relationship.

<sup>496</sup> Bourke (n 294); Brownmiller, 'Making Female Bodies the Battlefield' (n 8); Doris E Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 *Feminist Legal Studies* 145, 145-163; Ehrenreich (n 476) 130; Eifler (n 8) 91; Stevi Jackson, 'The Social Context of Rape: Sexual Scripts and Motivations' in Ronald J Berger and Patricia Searles (eds), *Rape and Society: Readings on the Problem of Sexual Assault* (Westview Press 1995) 19-21; Leatherman (n 495) 13-14, 155; Donna Pankhurst, 'Sexual Violence in War' in Laura J Shepherd (ed), *Gender Matters in Global Politics: A Feminist Introduction to International Relations* (Routledge 2010) 152; Seifert (n 8) 88-93; Meredith Turshen, 'The Political Economy of Rape: An Analysis of Systematic Rape and Sexual Abuse of Women During Armed Conflict in Africa' in Fiona Clark and Caroline NO Moser (eds), *Victims, Perpetrators Or Actors? Gender, Armed Conflict and Political Violence* (Zed 2001) 59; See also Paul Kirby, 'How is Rape a Weapon of War? Feminist International Relations, Modes of Critical Explanation and the Study of Wartime Sexual Violence' (2012) 9 *European Journal of International Relations* 797.

<sup>497</sup> Robert Jackson and Georg Sørensen, 'Social Constructivism' in Robert Jackson and Georg Sørensen (eds), *Introduction to International Relations: Theories and Approaches* (3<sup>rd</sup> edn, Oxford University Press 2007) 161- 177; Seifert (n 8) 88.

can be understood as a form of interpersonal violence as “one person uses power and control over another through physical, sexual, or emotional threats or actions, [...] or other kinds of coercive behavior.”<sup>498</sup> In the case of male to female rape, rape can also be understood as an act of social violence as it targets a woman because of her membership in the social category of ‘women’.<sup>499</sup> Rape is used as a means to regulate unequal power relationships between men and women in peace and wartime. Men are seen as holding an active power to violate, while women are viewed to be passive and open to violations.<sup>500</sup> This construction of aggressive sexuality normalises, neutralises and legitimises a prevailing system of misogynist norms.<sup>501</sup> In times of crisis, this underlying hostility is actualised as the threshold for direct acts of sexualised violence is lower than in times of peace.<sup>502</sup> This ‘continuum thesis’ can explain opportunistic sexualised violence in wartime.<sup>503</sup> However, it assumes that the same norms of patriarchy are shared throughout a national community, disregarding possible variations in sub-groups. Moreover, it is argued that patriarchal culture cannot account for conflicts where sexualised violence is strategically promoted by some but not all parties to the conflict.<sup>504</sup> It is further argued that

“the continuum thesis does not explain the innovations in sexual brutality that we observe on the part of some armed organizations (rape with guns, sexual mutilation, etc.), innovations that would appear to have little precedent during peacetime. Moreover, when armed organizations engage in high levels of rape during conflict, the very high fraction of rapes that are carried out by multiple perpetrators contrasts sharply to the fraction observed during peacetime. Nor

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<sup>498</sup> ReachOut, ‘Fact Sheet: Interpersonal Violence’ <http://us.reachout.com/facts/factsheet/interpersonal-violence> accessed 08 June 2015.

<sup>499</sup> Allen D Grimshaw, ‘Interpreting Collective Violence: An Argument for the Importance of Social Structure’ in James F Short Jr and Marvin Eugene Wolfgang (eds), *Collective Violence* (Transaction Publishers 2009) 38.

<sup>500</sup> Bourke (n 294) 357-386; Brownmiller, *Against Our Will* (n 59) 32; Cynthia Cockburn, ‘The Gendered Dynamics of Armed Conflict and Political Violence’ in Fiona Clark and Caroline NO Moser (eds), *Victims, Perpetrators Or Actors? Gender, Armed Conflict and Political Violence* (Zed 2001) 17; Leatherman (n 495) 14-15, 63-88; Pankhurst (n 496) 153; Skjelsbeak (n 495) 212, 217-218; Turshen (n 496) 59-60; Theresa Wobbe, ‘Die Grenzen der Gemeinschaft und die Grenzen des Geschlechts’ in Gesa Lindemann and Theresa Wobbe (eds), *Denkachsen. Zur theoretischen und institutionellen Rede vom Geschlecht* (Suhrkamp 1994) 185-195; See also Kirby (n 496).

<sup>501</sup> Bourke (n 294) 357-386; Jackson (n 496) 21; Seifert (n 8) 91-106; Skjelsbeak (n 495) 212, 217-218.

<sup>502</sup> Bourke (n 294) 357-386; Leatherman (n 495) 4; Pankhurst (n 496) 153; Seifert (n 8) 104-106; See Kirby (n 496).

<sup>503</sup> Wood (n 492) 9.

<sup>504</sup> Wood (n 492) 6.

does the thesis account for high levels of sexual violence against boys and men during conflict on the part of some armed organizations.”<sup>505</sup>

Focusing on times of war, a different but connected line of argument emphasises that sexualised war violence as an act of interpersonal and social violence can be the product of social interactions in fighting groups. This indicates interpersonal as well as institutional causes of the perpetration of war rapes. Superiors may tolerate acts of sexualised war violence because intervention “may lessen the respect of subordinates for their superiors (in a unit dominated by those who see nothing wrong in rape of civilians, the commander who would attempt to prohibit it may be seen as weak) and thereby undermine vertical cohesion.”<sup>506</sup> Combatants may have a desire to conform to the behaviour of others in the unit and perpetrate acts of sexualised war violence because others do.<sup>507</sup> Pointing towards structural causes, the perpetration of war rapes is also ascribed to military masculinity into which fighters are indoctrinated by superiors and/or socialised through peer pressure. Military masculinity is linked to the construction and exercise of a monopoly of power and heterosexuality, the suppression of feelings of insecurity, gentleness and other ‘feminine’ characteristics. This builds on and reaffirms more general norms of masculinity as well as patriarchal hierarchies between men and women. It may also make it easier for men to commit acts of sexualised war violence. The strategic purpose of the use of sexualised violence is to manifest the militaristic masculine identity of the male perpetrator.<sup>508</sup> In addition, individual causes are highlighted when war rapes are seen as necessary for effective combat performance of soldiers. In the dangers of war, aggression including sexualised violence is regarded as the only way to survive psychologically. Soldiers view sexual relations as countering battle anxiety. Stressing the relevance of interpersonal causes of war rape, fears to be overpowered by female fighters, who are believed to be fiercer than men, make male soldiers anxious. They do not want to be embarrassed.<sup>509</sup> Consequently, in wars in which women fought, “manliness demanded

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<sup>505</sup> Wood (n 492) 8.

<sup>506</sup> Wood (n 492) 17.

<sup>507</sup> Wood (n 492) 15.

<sup>508</sup> Bourke (n 294) 357-386; Brownmiller, *Against Our Will* (n 59) 32-33, 64; Cockburn (n 500) 16; Ehrenreich (n 476) 127-129; Leatherman (n 495) 81-82; Pankhurst (n 496) 152-154; Seifert (n 8) 95-98; Skjelsbeak (n 495) 215-217; See also Kirby (n 496); Madeline Morris, ‘By Force of Arms: Rape, War, and Military Culture’ (1996) 45 *Duke Law Journal* 651.

<sup>509</sup> Bourke (n 294) 375; Ehrenreich (n 476) 97-103, 128-129; Leatherman (n 495) 99; Pankhurst (n 496) 155.

particular vigilant policing.”<sup>510</sup> “For soldiers, rape is a way to take out their suffering on women [...]. For others, rape is a way for them to have sex when the situation affords them no opportunity for a regular family life or chance to date a woman.”<sup>511</sup>

“However, the argument [linking the perpetration of war rapes to social interactions within fighting groups] does not explain the absence of sexual violence on the part of some very effective insurgent and State armies. Similarly, increased opportunity to rape during war cannot account for armed organizations with ample access to civilians that engage in little rape. Nor does the ‘substitution’ argument (that rape ‘substitutes’ for sex with prostitutes, camp followers, female combatants or willing civilians) account for the targeting of particular groups of women, the often extreme violence that frequently accompanies conflict-related rape, the occurrence of sexual torture, or rape by forces with ample access to prostitutes.”<sup>512</sup>

This can be explained by the understanding of war rape as a tool and weapon of war. Here, interpersonal and structural causes are offered to explain the perpetration of war rapes. War rapes are often orchestrated and perpetrated systematically as an integral rather than incidental part of war. The rape of women is essential to military strategy.<sup>513</sup> It furthers “militaristic, masculinist and/or nationalist goals”.<sup>514</sup> Therefore, in addition to being a form of interpersonal and social violence as explained above, war rapes are a form of political violence. They are a political form of aggression and consequently a public rather than private issue.<sup>515</sup> “Placing rape at the centre of the conflict – as a constituent element of the violence – is an important manoeuvre allowing for the recognition that violence is gendered.”<sup>516</sup> The public nature of war rapes is further highlighted by the fact that they are often perpetrated in public.<sup>517</sup> Strategic war rapes can be understood as an attack against women as women, as well as part of an attack against the enemy. Male

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<sup>510</sup> Bourke (n 294) 375.

<sup>511</sup> Leatherman (n 495) 155.

<sup>512</sup> Wood (n 492) 6.

<sup>513</sup> Debra Bergoffen, ‘Exploiting the Dignity of the Vulnerable Body: Rape as a Weapon of War’ (2009) 38 *Philosophical Papers* 307; Bourke (n 294) 24, 357-386; Brownmiller, *Against Our Will* (n 59) 37-38; Buss, ‘Rethinking “Rape as a Weapon of War”’ (n 496); Kirby (n 496); Leatherman (n 495); Pankhurst (n 496) 152; Skjelsbeak (n 495) 213; Stiglemayer (n 10); Turshen (n 496).

Kirby (n 496): The rape of men in war, in contrast, arguably is peripheral to military strategy.

<sup>514</sup> Buss, ‘Rethinking “Rape as a Weapon of War”’ (n 496) 149; See also Skjelsbeak (n 495) 213.

<sup>515</sup> Brownmiller, *Against Our Will* (n 59) 37-38; Kirby (n 496); Seifert (n 8); Skjelsbeak (n 495) 213.

<sup>516</sup> Buss, ‘Rethinking “Rape as a Weapon of War”’ (n 496) 151.

<sup>517</sup> Brownmiller, *Against Our Will* (n 59) 51, 58-60; Pankhurst (n 496) 152; Skjelsbeak (n 495) 221.

members of the more powerful group do not only hold a protective power position over women in their own group, but also a controlling power position over women of their opponent's group. In 'nationalist' conflicts, women become a symbol of the nation. They are targeted because of their cultural position and importance in family structure. War rapes are perpetrated to destroy communities by targeting women's life-giving capacities, their political and economic assets. In patriarchal systems that value women's virginity and define women as men's possessions, survivors are viewed as damaged goods, threatening reproduction. This highlights that war rapes are a form of economic violence, targeting economically disadvantaged individuals or groups. In addition to threatening reproduction, war rapes also destroy communities by blaming, stigmatising and excluding survivors. They traumatise people and psychologically damage the opponent group. War rapes are a means of communication between male members of opposing fighting groups. According to this view, war rapes are symbolic expressions of the humiliation of male opponents. They are a means of demonstrating that these men were unable to perform their protective duties. In this context, it becomes clear that sexualised war violence, in contrast to sexualised violence committed in peacetime, is not directed against a woman as an individual person, but against her as a symbol for a whole group. The effect on men is the key point. War rapes crush men's morale, will, and desire for battle. They humiliate and instil fear and terror into the opponent group.<sup>518</sup> Additionally, war rapes are used as a means of reprisal and retaliation.<sup>519</sup>

Addressing one's own group, war rapes committed by opponents as a form of political violence are also used as a means of propaganda, charging patriotism and arousing hate against the enemy. Here, structural causes in the sense of propaganda policies are offered to explain the perpetration of war rapes. Using war rapes for propaganda purposes also heightens visibility of sexualised violence against women in some contexts, and relative invisibility in others. International courts and tribunals, international organisations and civil society recognise that women were raped in large numbers as part of many wars. However, rape in peacetime as well as the rape of individual women in wartime has often been absent especially from the record of courts and tribunals. It also remains largely invisible as a matter of political urgency. Stories of rape have been listened to when they

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<sup>518</sup> Bergoffen (n 513); Brownmiller, 'Making Female Bodies the Battlefield' (n 8); Cockburn (n 500) 19; Drakulić (n 8) 180; Jean Bethke Elshtain, *Women and War* (Basic Books 1987) 67; Leatherman (n 495) 8-9, 15-16, 21-22, 48-49, 51, 81-82, 84, 154; Pankhurst (n 496) 152; Seifert (n 8) 93-94; Skjelsbeak (n 495) 215, 218-223; Turshen (n 496) 55-59, 62, 65-66.

<sup>519</sup> Brownmiller, *Against Our Will* (n 59) 56, 64-72.

supported constructions of national identity and prominent post-war constructions of the enemy, but not when told to support survivors' demands for remedies such as health care and reparations.<sup>520</sup>

The above discussion shows that theoretical considerations regarding the causes and meanings of war rape focus on male to female rape. They understand rape as an act of aggression and force, perpetrated under coercive circumstances. Different explanations of the causes and meanings of war rape advance different views on whether war rape is an act of violence between two individuals, or a form of social violence targeting a particular group of people. Consequently, different theories locate the causes of war rape in the psyche of the perpetrator and in unequal power structures respectively.

The judgment in the *Foča* case dealt with by the ICTY reflects various theoretical considerations of the causes and meanings of war rape. Instead of focusing on male to female rape, it advances a rape definition that recognises men and women as potential perpetrators and survivors of rape. The *Foča* definition<sup>521</sup> acknowledges the importance of the context in which an act of rape is perpetrated. However, it also introduces an element of consent. This sets it apart from definitions developed by the ICTR in the *Akayesu* case<sup>522</sup> and by the ICTY in the *Furundžija* case<sup>523</sup> and *Foča* indictment.<sup>524</sup> A consent-based rape

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<sup>520</sup> Brownmiller, *Against Our Will* (n 59) 43-47, 65; Buss, 'Rethinking "Rape as a Weapon of War"' (n 496) 154; Chiseche Mibenge, 'Gender and Ethnicity in Rwanda: On Legal Remedies for Victims of Wartime Sexual Violence' in Dubravka Zarkov (ed), *Gender, Violent Conflict, and Development* (Zubaan Books 2008) 147; Binaifer Nowrojee, 'Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims' [2005] Harvard Human Rights Journal 85.

<sup>521</sup> *Foča* Trial Judgment (n 19) para 460: The Trial Chamber understood "the actus reus of the crime of rape in international law [to be] constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."

<sup>522</sup> *Akayesu* Trial Judgment (n 12) para 598: The Trial Chamber in *Prosecutor v Jean-Paul Akayesu* arrived at a definition interpreting rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".

<sup>523</sup> *Furundžija* Trial Judgment (n 13) para 185: In *Prosecutor v Anto Furundžija*, rape was defined as: "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator [...]; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person."

<sup>524</sup> *Foča* Indictment (n 12) para 4.8: The *Foča* indictment defines rape as "acts of forcible sexual penetration of a person, or forcing a person to sexually penetrate another [...]. Sexual penetration includes penetration, however slight, of the vagina, anus or oral cavity, by the penis. Sexual penetration of the vulva or anus is not limited to the penis. Such acts can constitute an element of a crime against humanity, (enslavement under Article 5(c), torture under Article 5(f), rape under Article 5(g)), violations of the laws and customs of war,

definition connotes an understanding of rape as an act between two individuals and the causes of rape as located in the psyche of the perpetrator and victim. This is further discussed below.

### 5.3 *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Foča case)*

Employing conventional methods of law, the Trial Chamber in the *Foča* case disagreed with the findings in *Prosecutor v Anto Furundžija* that “the basic underlying principle common to [the major national jurisdictions is] that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim.”<sup>525</sup> Rather than force, threat of force or coercion, the Trial Chamber understood “the true common denominator which unifies the various systems [to] be a wider or more basic principle of penalising violations of *sexual autonomy*”,<sup>526</sup> a point that the Trial Chamber in the *Furundžija* case indicated. Reconsidering the legal systems surveyed in the *Furundžija* judgment and conducting another survey of the relevant provisions of a number of other jurisdictions, the Trial Chamber in the *Foča* case found the factors classifying the relevant sexual acts as the crime of rape to fall within three broad categories

- “(i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
- (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
- (iii) the sexual activity occurs without the consent of the victim.”<sup>527</sup>

Based on these considerations, the Trial Chamber understood

“the *actus reus* of the crime of rape in international law [to be] constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such

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(torture under Article 3 and Article 3(1)(a) of the Geneva Conventions) and a grave breach of the Geneva Conventions, (torture under Article 2 (b)).”

<sup>525</sup> *Foča* Trial Judgment (n 19) para 440.

<sup>526</sup> *ibid.*

<sup>527</sup> *Foča* Trial Judgment (n 19) para 442.

sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.”<sup>528</sup>

In developing a mechanical, consent-based rape definition, the ICTY in the *Foča* case advanced a definition of rape that is the opposite of the conceptual, coercion-based definition set out by the ICTR in the *Akayesu* case.<sup>529</sup> Paragraph a and b of the *Foča* definition, however, are similar to the rape definition developed by the ICTY in the *Furundžija* case.<sup>530</sup> As the *Akayesu* definition, however, the *Furundžija* definition is coercion-based rather than consent-based. The Trial Chamber in the *Foča* case, in contrast, viewed lack of consent and the knowledge thereof as an element of rape while also acknowledging that coercion, force or threat of force could establish a lack of consent.<sup>531</sup>

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<sup>528</sup> *Foča* Trial Judgment (n 19) para 460.

<sup>529</sup> *Akayesu* Trial Judgment (n 12) para 598: The Trial Chamber in *Prosecutor v Jean-Paul Akayesu* arrived at a definition where rape is understood as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.

<sup>530</sup> *Furundžija* Trial Judgment (n 13) para 185: In *Prosecutor v Anto Furundžija*, rape was defined as: “(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator [...]; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.”

<sup>531</sup> In regard to the element of consent and coercion, the ICTR Appeals Chamber in *Prosecutor v Sylvestre Gacumbitsi* (ICTR-2001-64-A (07 July 2006) para 147-157) maintains the *Foča* definition of rape and at the same time acknowledges the importance of the definition developed in *Akayesu*. This clarification resulted out of a request by the prosecution to address the definition of rape under International Criminal Law, and particularly the question whether consent was an element of the crime. In following this request, the Appeals Chamber reconciled the rape definitions developed in the *Akayesu* and the *Foča* cases through determining that non-consent is an element of the crime of rape (as in the *Foča* case) that can be proven by establishing coercive circumstances under which meaningful consent is impossible (as advanced in the *Akayesu* case).

This conclusion was already indicated by the Trial Chamber (ICTR-2001-64-A (17 June 2004) para 325) in its statement that “[u]nder such circumstances, the utterances made by the Accused to the effect that in case of resistance the victims should be killed in an atrocious manner, and the fact that rape victims were attacked by those they were fleeing from, adequately establish the victims’ lack of consent to the rapes.” However, with this determination, the Trial Chamber did not directly state whether or not it understood consent as an element of the crime of rape, leaving room for clarification by the Appeals Chamber.

Regarding the element of invasion/penetration, the Trial Chamber also followed the *Foča* definition as well as the *Furundžija* definition, defining rape as “any penetration of the victim’s vagina by the rapist with his genitals or with any object [...], although the definition of rape [...] is not limited to such acts alone.” (para 321). While the Trial Chamber also cites the *Akayesu* case in support of this definition, similarity is only implied in the statement that the crime of rape is not limited to the elements as described in the *Foča* definition. Alison Cole in her article ‘Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape Under International Law’ ((2008) 8 International Criminal Law Review 68) notes that “[s]uch an approach seeking to reconcile both cases is in line with the subsequent *Muhimana* case”. The Trial Chamber there “[took] the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a ‘physical invasion of a sexual nature’, *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.” (ICTR-95-1B-T (28 April 2005) para 550).



The Trial Chamber highlighted that rape is seen as an act of “gender discrimination”<sup>532</sup> and a “serious [violation] of sexual autonomy [which is] violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant”.<sup>533</sup> Contrary to the understanding of coercion as being the central element of the crime of rape, in a consent-based definition the nature of the crime of rape is understood along the lines of deprivation of sexual freedom and self-determination.<sup>534</sup> The focus lies on “passion gone wrong”.<sup>535</sup> An emphasis is placed on the psyche of the victim and perpetrator. The relevant events are framed as individuals engaged in single interactions.<sup>536</sup> It can be argued that a consent-based rape definition is victim-centred and stresses the survivor’s agency. This establishes rape survivors as active subjects, empowering them. Consequently, a consent-based definition would serve rape survivors. However, it would be detrimental for them if their lack of consent would need to be proven as this can be very problematic and may lead to unsuccessful claims. Prosecutors look for evidence such as struggle, injury or distress to help them prove that the survivor did not consent. Frequently, however, there is no such corroborating evidence for example because survivors of war rape did not see a doctor immediately after having been raped. In the absence of any other evidence to help prove the survivor did not consent, cases may fail to meet the evidential requirements of courts or tribunals and consequently may be unsuccessful. Therefore, the ICTY Trial Chamber’s acknowledgement that coercion or (threat of) force establish lack of consent is crucial.

In addition to developing a mechanical, consent-based rape definition that also acknowledges the importance of the context in which an act of rape is perpetrated, the judges Florence Ndepele Mwachande Mumba, David Hunt and Fausto Pocar also elaborated on the crime of enslavement. This later helped judges at the SCSL in determining whether acts of forced marriage could be interpreted as an exercise of powers attaching to the right of ownership, and consequently if forced marriage could be understood as an act of sexual slavery. The judges in the *Foča* case held that the detention

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<sup>532</sup> *Foča* Trial Judgment (n 19) para 867.

<sup>533</sup> *Foča* Trial Judgment (n 19) para 457.

<sup>534</sup> Centre on Law and Globalization (n 428).

<sup>535</sup> *ibid.*

<sup>536</sup> *ibid.*

of Bosnian Muslim women in various centres, private apartments and houses where they had to cook and clean for, and (sexually) serve, the Bosnian Serb soldiers living there<sup>537</sup> falls under the crime of enslavement.<sup>538</sup> Considering and reviewing the relevant provisions on enslavement under a number of International Humanitarian Law and international Human Rights instruments as well as case law of the US Military Tribunal, the European Commission and Court of Human Rights, and the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia,<sup>539</sup> the ICTY defined enslavement in a broad, gender-neutral way as “the exercise of any or all of the powers attaching to the right of ownership over a person”.<sup>540</sup> Therefore, it could include contemporary forms of slavery that are impossible to exhaustively list.<sup>541</sup> Here, the judges demonstrated contextualised thinking. By defining enslavement gender-neutrally, they challenged power structures as well as assumptions and stereotypes about the kinds of enslavement women and men are subjected to. The tribunal determined that the factors taken into consideration in determining whether or not the crime of enslavement was committed include

“control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>542</sup>

Moreover, the ICTY stressed that enslavement includes situations where, even if the survivor would attempt to flee, she has nowhere to go and is aware of the risks involved if recaptured.<sup>543</sup> As explained below, this definition could implicitly include forced marriage.<sup>544</sup>

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<sup>537</sup> *Foča Trial Judgment* (n 19) para 474.

<sup>538</sup> UNSC Resolution 827 (n 11) art 5(c).

<sup>539</sup> *Foča Trial Judgment* (n 19) para 519-538.

<sup>540</sup> *Foča Trial Judgment* (n 19) para 539.

<sup>541</sup> Christopher K Hall, ‘Article 7 Crimes against Humanity para. 1 (c) Enslavement’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2<sup>nd</sup> edn, CH Beck 2008).

<sup>542</sup> *Foča Trial Judgment* (n 19) para 543.

<sup>543</sup> *Foča Trial Judgment* (n 19) para 750.

<sup>544</sup> See sections 5.4.2 and 5.4.3.3 for further comments on the categorisation of forced marriage as a form of enslavement.

A few months after the *Foča* judgment was passed, the ICTY explicitly recognised forced marriage during armed conflict as a prosecutable crime. In the context of discussing constituent elements of the crime of rape, the judgment in *Prosecutor v Miroslav Kvočka et al* states that “[s]exual violence would also include such crimes as [...] forced marriage”.<sup>545</sup> While this explicit recognition of forced marriage as a crime serves survivors,<sup>546</sup> it overemphasises the sexual elements of forced marriage, neglecting the non-sexual but gendered ones. Consequently, it acknowledges only a part of survivors’ realities. This is discussed further below in the context of the SCSL’s jurisprudence that elaborated on the crime of forced marriage and contributed towards its definition and understanding.

The increased attention of international tribunals devoted to forced marriage from the early 2000s on might have been fuelled by reports of the UN Special Rapporteur on Violence against Women, its Causes and Consequences as well as by the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict which explicitly discuss forced marriage. The previous lack of attention may also stem from the emphasis placed on rape at the expense of other acts of war violence committed against women. However, the previous lack of attention may also be due to the fact that forced marriages in times of armed conflict actually may have been perpetrated on a smaller scale. Another possible explanation may be that the interpretation of forced marriages is based on socio-culturally accepted conventions that international courts and tribunals were hesitant to interfere with.

#### 5.4 The Special Court for Sierra Leone (SCSL)

After the ICTY had elaborated on the crime of enslavement and explicitly mentioned forced marriage as a sexual violence crime, the SCSL build on the tribunal’s work in the *AFRC*, *RUF* and *Taylor* cases. While it established forced marriage as a form of sexual slavery and an inhumane act respectively, the discussion of the Special Court’s

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<sup>545</sup> *Prosecutor v Miroslav Kvočka and others* (Trial Judgment) IT-98-30/1-T “Omarska, Keraterm & Trnopolje Camps” (02 November 2001) fn 343.

<sup>546</sup> See parts 1.2 and 1.5 as well as section 5.4.3.1 for further discussion.

statute below demonstrates that forced marriage also includes other acts of sexualised violence covered under Article 2(g). Forced marriage could also amount to enslavement,<sup>547</sup> torture,<sup>548</sup> outrages upon personal dignity,<sup>549</sup> “[v]iolence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”<sup>550</sup> and/or taking hostages,<sup>551</sup> intentionally directing attacks against the civilian population,<sup>552</sup> conscripting or enlisting children<sup>553</sup> and/or offences relating to the abuse of girls.<sup>554</sup> Elements of the below account of forced marriage that illustrate how the conduct matches these different categorisations reoccur in the analysis of the Special Court’s jurisprudence as well as in the discussion of theoretical considerations regarding the causes and meanings of forced marriage. In these contexts, the recurring account of elements of forced marriage is part of the understanding of the crime advanced by actors involved in the SCSL cases and of scholars respectively. Therefore, it is necessary to repeat them.

#### *5.4.1 The Special Court’s establishment*

In response to new outbreaks of violence in Freetown in May 2000, the Sierra Leonean government called for UN assistance to establish an international tribunal to try Revolutionary United Front (RUF) fighters involved. The hybrid SCSL was created as a result.<sup>555</sup>

The international NGO No Peace without Justice developed a programme supporting the UN and the Sierra Leonean government<sup>556</sup> in their plans to “try those who bear the greatest responsibility for serious violations of international humanitarian law and

<sup>547</sup> Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 138, 145, 97 AJIL 295, UN Doc S/2002/246 (SCSL statute) art 2(c).

<sup>548</sup> SCSL statute (n 547) art 2(f).

<sup>549</sup> SCSL statute (n 547) art 3(e).

<sup>550</sup> SCSL statute (n 547) art 3(a).

<sup>551</sup> SCSL statute (n 547) art 3(c).

<sup>552</sup> SCSL statute (n 547) art 4(a).

<sup>553</sup> SCSL statute (n 547) art 4(c).

<sup>554</sup> SCSL statute (n 547) art 5.

<sup>555</sup> Michael O’Flaherty, ‘Sierra Leone’s Peace Process: The Role of the Human Rights Community’ (2004) 26 Human Rights Quarterly 29, 36, 59.

<sup>556</sup> O’Flaherty (n 555) 40.

Sierra Leonean law”.<sup>557</sup> The UN Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk, briefed members of the UNSC on violence against women in Sierra Leone and “highlighted the need to investigate, prosecute and punish those responsible for rape and other forms of gender-based violence”.<sup>558</sup> However, No Peace without Justice and the Special Rapporteur appear to be an exception within the Human Rights community active in Sierra Leone. Institutionally, the role of civil society groups in the Special Court’s establishment was almost non-existent.<sup>559</sup> Instead, the majority of Human Rights organisations, including the United Nations Human Rights Committee and the National Committee for Democracy and Human Rights focused on the release of abductees, humanitarian access to territory under the control of fighting groups and the establishment of a TRC.<sup>560</sup> Similarly, Mary Robinson, the United Nations High Commissioner for Human Rights at the time, drew attention to the need for justice and accountability for the Human Rights violations committed in the conflict and guaranteed her support for a TRC.<sup>561</sup> After the government’s request to establish the Special Court, the Sierra Leonean Human Rights community held meetings to develop a common position. It advocated for the court to exist side by side with the TRC, for a broader jurisdiction that would go beyond the crimes committed only by the RUF during the conflict and for a purely international criminal tribunal rather than a hybrid court that would involve Sierra Leonean law and judges.<sup>562</sup> Their first two points found favour with the United Nations Secretary-General who proposed the details relating to the establishment of the Special Court to the UNSC for its subsequent consideration.<sup>563</sup>

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<sup>557</sup> Special Court for Sierra Leone, ‘About’ (2011) <<http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx>> accessed 10 January 2013.

<sup>558</sup> United Nations, ‘Women, Peace and Security’ (2002) <<http://www.un.org/womenwatch/daw/public/eWPS.pdf>> accessed 13 August 2013.

<sup>559</sup> J Peter Pham, ‘Liberia and Sierra Leone: A Study of Comparative Human Rights Approaches by Civil Society Actors’ [2006] *Interdisciplinary Journal of Human Rights Law* 69, 95.

<sup>560</sup> O’Flaherty (n 555) 38, 49-52; Pham (n 559) 89-96.

<sup>561</sup> O’Flaherty (n 555) 34, 54-55.

<sup>562</sup> O’Flaherty (n 555) 59-60.

<sup>563</sup> Franke (n 101) 827; O’Flaherty (n 555) 60.

#### 5.4.2 The Special Court's statute

International NGOs were involved in drafting the SCSL's statute. Due to the particular role played by children in the conflict, however, they focused mainly on children's rights and childcare rehabilitation.<sup>564</sup> Together with the United Nations Development Programme, the International Centre for Transitional Justice contributed to the gender-related aspects of the SCSL statute. It funded two initiatives to provide technical assistance to the court, one of which was supporting a local group of female activists who drafted a new gender equality law.<sup>565</sup> This focus on children and gender equality might have resulted in the apparent lack of involvement of NGOs in issues of sexualised war violence against women when the SCSL's statute was drafted. Together with the above-mentioned primary interest of the majority of the Sierra Leonean Human Rights community in the TRC rather than the Special Court, this could also explain the lack of engagement of NGOs in the SCSL cases discussed below. Another possible explanation for the lack of NGO engagement in SCSL cases is the Special Court's rejection of spontaneous applications for *amicus curiae* status at the trial stage.<sup>566</sup>

Despite the apparent lack of involvement of NGOs in issues of sexualised war violence against women at the drafting stage of the SCSL's statute, Article 2(g) of the SCSL statute explicitly mentions "[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" as crimes against humanity when committed "as part of a widespread or systematic attack against any civilian population".<sup>567</sup> Forced marriage includes acts of rape, forced pregnancy and other forms of sexual violence and it was understood to be a form of sexual slavery. Therefore, if it met the qualification of a crime against humanity, it could be charged under Article 2(g).

Taking the *Foča* case<sup>568</sup> as precedent, forced marriage could also be charged as enslavement.<sup>569</sup> In a situation of forced marriage, a woman is abducted and taken to the fighters' camp where she is forced or coerced to stay. Even though she has to leave the

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<sup>564</sup> Ellis (n 34) 150-151.

<sup>565</sup> Ellis (n 34) 150-151: The other initiative funded by the International Centre for Transitional Justice was "creating a Law Reform Initiative to assist in redrafting criminal law provisions."

<sup>566</sup> Williams and Woolaver (n 415) 177.

<sup>567</sup> SCSL statute (n 547).

<sup>568</sup> For further of the *Foča* case discussion see section 4.2.6.3.3 and part 5.3.

<sup>569</sup> SCSL statute (n 547) art 2(c).

house and even the camp to fulfil her duties, her physical environment is controlled by her forced husband<sup>570</sup> and the fighting group. In addition to her movements and work, the forced husband also controls her sexuality in the sense that he dictates the modalities of the couple's physical relationship. As mentioned before, forced wives are subjected to various acts of sexualised violence and expected to have an exclusive relationship with their forced husband. Children born from these unions as well as socio-economic considerations coerce forced wives into staying with their forced husband sometimes even after the conflict has ended. Therefore, forced marriages are highly valued in fighting groups as they establish bonds and dependency structures which deter escape of forced wives. In addition to social bonds that compel forced wives to stay with the fighting group, they often have nowhere else to go due to the stigmatisation they face by their families, communities and by society as a whole. Consequently, they mostly do not attempt to escape and make a choiceless decision to remain with the fighting group. Escape is further deterred by severe punishment

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<sup>570</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Prosecution Filing of Expert Report Pursuant to Rule 94(bis) and Decision of Prosecution Request for Leave to Call an Additional Expert Witness) SCSL-04-16-T "AFRC Case" (08 August 2005); Carlson and Mazurana (n 6) 5; Coulter (n 52) 99; GBV under the Khmer Rouge, 'Forced Marriage' <<http://gbvkr.org/gender-based-violence-under-khmer-rouge/facts-and-figures/forced-marriage/>> accessed 08 April 2015; Kramer (n 489) 24; Lynn Lawry, 'Panel Six: Methodological Challenges and Opportunities' (The Missing Peace Symposium 2013, Washington DC, 14-16 February 2013); Katerina Novotna and Ryszard Piotrowicz, 'Forced Marriage in the Jungle: Time to Stop Beating about the Bush' (2007) 81 Australian Law Journal 302, 304; Toy-Cronin (n 59) 543, 558: It could be argued that the term 'enforced husband' would be a more appropriate name for the male party to a forced marriage as he makes the choice to marry; the woman does not. However, as discussed below, it is crucial to emphasise that men are also coerced or forced into forced marriages. In a number of African conflicts, fighters who do not conform and engage in forced marriages are excluded from, and punished by, the fighting group. This suggests that forced husbands gain the acceptance of the group by choosing forced marriage. Therefore, to be accepted into the fighting group, men who actually reject forced marriage are forced or coerced into them. They have to desire, support and sustain forced marriage and cooperate against their will. In Khmer Rouge-ruled Cambodia, men and women were equally forced into marriage. According to GBV under the Khmer Rouge, "couples were arbitrarily married without choice or consent and pressured to consummate their marriage [to ensure the emergence of the next generation of workers in a union that would naturally provide less family loyalty, and as a corollary decreased opposition to State practices which could be considered a threat to family members]." In addition to men being coerced or forced into marriage, it is important to stress women's agency. Some women strategically chose to join a fighting group and to become a fighter's wife in hope for protection, to limit the abuses they face, to benefit from looted goods or to escape parental control. Therefore, forced marriage can be understood as a means of survival. However, it has to be considered whether cases where women made a self-determined, strategic choice to join a fighting group and consequently were made a fighter's wife are still examples of forced marriage or rather of marriage of convenience, of choosing the lesser evil rather than making an independent decision. Leaving this question aside, as women and men exercise degrees of choice in regard to entering into a forced marriage, and as coercion and/or force are used against both parties to a forced marriage, both, the use of the term 'forced wife/husband' and 'enforced wife/husband' would be justifiable. Due to the understudied nature of forced husbands as victims, and the tendency to negate forced wives' agency, the present researcher wants to refrain from establishing a hierarchy in terms of which spouse exercised more choice and which spouse was subjected to a higher degree of coercion and/or force. Therefore, the same adjective should be used for both parties to a forced marriage. Emphasising the degree of coercion and/or force exercised against both spouses, and therefore the context in which forced marriages are formed, the terms 'forced wife' and 'forced husband' are used throughout this thesis.

of those who attempt escape but are caught. Means of punishment range from corporal punishment, rape and torture, to death.<sup>571</sup>

This account demonstrates that constituting elements of forced marriage often include torture<sup>572</sup> and other inhumane acts<sup>573</sup> as they are discriminatory acts that inflict severe physical or mental injury, pain or suffering upon a forced wife to intimidate her. As forced husbands humiliate, degrade or otherwise violate the dignity of forced wives, forced marriage could also be charged under Article 3(e) of the SCSL's statute as "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault", constituting serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>574</sup> Furthermore, it becomes apparent in the above description of situations of forced marriage that they include acts of "[v]iolence to life, health and physical or mental well-being of persons, in particular [...] cruel treatment such as torture, mutilation or any form of corporal punishment",<sup>575</sup> and taking of hostages.<sup>576</sup>

Article 4 of the SCSL statute lists other serious violations of International Humanitarian Law. Here, forced marriage could fall under intentionally directing attacks against the civilian population.<sup>577</sup> Civilian women are intentionally targeted for forced marriage to demoralise and disable the opponent by dissolving traditional bonds between families and within society. Considering that many women who are abducted are underage

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<sup>571</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Decision on Prosecution request for leave to call an additional witness (Zainab Hawa Bangura) pursuant to Rule 73 bis (E), and on joint Defence notice to inform the Trial Chamber of its position vis-à-vis the proposed expert witness (Mrs Bangura) pursuant to Rule 94 bis) SCSL-04-16-T "AFRC Case" (05 August 2005); United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3); Jeannie Annan and Christoph Blattman, 'On the Nature and Causes of LRA Abduction: What the Abductees Say' in Bernd Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (Zed Books 2010); Jeannie Annan and others, 'Civil War, Reintegration, and Gender in Northern Uganda' (2011) 55 *Journal of Conflict Resolution* 877; Julie Baily, 'Marriage in Conflict: Formerly Abducted Women's Struggles with Marriage upon Return' (2009) School for International Training Graduate Institute/ Study Abroad, Independent Study Project Collection, Paper 813 <[http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=1816&context=isp\\_collection](http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=1816&context=isp_collection)> accessed 08 July 2013; Carlson and Mazurana (n 6); Coulter (n 52); Dauvergne and Millbank (n 491); Kramer (n 489); Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55); Toy-Cronin (n 59).

<sup>572</sup> SCSL statute (n 547) art 2(f).

<sup>573</sup> SCSL statute (n 547) art 2(i).

<sup>574</sup> SCSL statute (n 547).

<sup>575</sup> SCSL statute (n 547) art 3(a).

<sup>576</sup> SCSL statute (n 547) art 3(c).

<sup>577</sup> SCSL statute (n 547) art 4(a).



and that, in addition to having to serve their forced husband sexually and otherwise, they are also forced to participate in combat, forced marriage could also be charged as conscripting or enlisting children.<sup>578</sup>

Article 5 of the SCSL statute covers the tribunal's jurisdiction based on Sierra Leonean law. Reflecting and reinforcing gender stereotypes of women and girls as victims of mainly sexualised war violence, Article 5(a) states that the Special Court has the power to prosecute persons who have committed

“[o]ffences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31): i. Abusing a girl under 13 years of age, contrary to section 6; ii. Abusing a girl between 13 and 14 years of age, contrary to section 7; iii. Abduction of a girl for immoral purposes, contrary to section 12.”<sup>579</sup>

Based on the account given, forced marriage can include all of the above violations covered by of the Special Court's statute.

#### 5.4.3 *The Special Court's jurisprudence*

Forced marriage in times of armed conflict was less well-theorised and less well-defined prior to the Special Court cases than war rape prior to the establishment of the ICTY and ICTR. This impacted on how the court approached and addressed it, contributing to developing a comprehensive understanding of the crime.

The following sections analyse the *AFRC*, *RUF* and *Taylor* cases. In these cases, forced marriage was defined as a form of sexual slavery and as an inhumane act. Evidence of forced marriage was also heard in relation to charges of acts of terror and outrages upon personal dignity. Moreover, the Special Court developed different ways of referring to the crime: forced marriage and conjugal slavery. Both names and their connotations are commented on below. Regardless of the label, however, there is a risk that forced marriage is defined based on the context-dependent and highly gendered roles wives and husbands perform in a forced marriage. It is crucial to keep the meaning of the term ‘marriage’ or ‘conjuality’ flexible and wide so as to adapt to the context and to capture different

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<sup>578</sup> SCSL statute (n 547) art 4(c).

<sup>579</sup> SCSL statute (n 547).

scenarios. In doing so, courts would also address concerns regarding the female victim/male perpetrator focus that shapes current understandings of the crime of forced marriage.<sup>580</sup> This understanding neglects situations where both spouses are forced into the marriage,<sup>581</sup> where a man is forced into marriage by a woman<sup>582</sup> and forced same-sex marriage. In addition to interpreting forced marriage as gender-neutral, this broader view of the identity of a survivor of forced marriage would contribute to the growing recognition of sexualised war violence perpetrated against men.<sup>583</sup> In addition to keeping the meaning of the term ‘marriage’ or ‘conjugal’ flexible and broad so as to capture different victim/perpetrator constellations, context-sensitivity is crucial regarding the roles wives and husbands perform in a forced marriage as they may vary in different contexts.<sup>584</sup> Care should also be taken that “patriarchal gender stereotypes of a wife’s role, such as household cooking and cleaning, are not inadvertently incorporated into jurisprudence that [...] seeks to make gains for women.”<sup>585</sup> The inclusion of such gender stereotypes would constitute a step backwards rather than a success for the feminist project of gender-sensitive recognition of crimes.<sup>586</sup> If the terms ‘marriage’ or ‘conjugal’ prevail in the criminalisation of this conduct, it would be crucial for courts to explicitly state that “recognition of highly gendered conjugal duties in any given forced marriage scenario does not in any way imply acceptance of those duties as legitimate”<sup>587</sup> to counter the incorporation of patriarchal gender stereotypes into International Law.

#### 5.4.3.1 *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (AFRC case)*

After amending the initial indictment to include charges of other inhumane acts particularised as forced marriage, the accused in the *AFRC* case were charged amongst

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<sup>580</sup> Prosecution Final Brief para 1009-1012 as cited in *AFRC* Trial Judgment (n 23) para 701; *AFRC* Appeals Chamber Judgment (n 23) para 199; *RUF* Trial Judgment (n 24) para 1293, para 1295.

<sup>581</sup> Toy-Cronin (n 59).

<sup>582</sup> Lawry (n 570).

<sup>583</sup> Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 55).

<sup>584</sup> Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 55); Toy-Cronin (n 59).

<sup>585</sup> Nowrojee (n 520) 102.

<sup>586</sup> Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 55); Toy-Cronin (n 59) 578.

<sup>587</sup> Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 55) 155.

others with rape, sexual slavery and any other form of sexual violence as well as other inhumane acts as crimes against humanity, and with outrages upon personal dignity as a violation of Common Article 3.<sup>588</sup> These four counts were supported with identical allegations that

“[a]n unknown number of women and girls were abducted from various locations within [six districts] and used as sex slaves and/or forced into ‘marriage’ and/or subjected to other forms of sexual violence. The ‘wives’ were forced to perform a number of conjugal duties under coercion by their ‘husbands’.”<sup>589</sup>

This broad and imprecise indictment<sup>590</sup> indicates that Chief Prosecutor David Crane was unsure about how the Trial Chamber<sup>591</sup> would consider sexual slavery and forced marriage in the light of a lack of previous jurisprudence on the crimes.<sup>592</sup> “Forced marriage as an inhumane act [...] [was] a novel legal charge. [The prosecution was of the opinion that] [t]he complexity and sensitivity of the issue [rendered] an expert opinion both material and relevant.”<sup>593</sup> Expert witness Zainab H Bangura was chosen to conduct research into forced marriage in Sierra Leone because the prosecution was convinced that

“the best evidence [...] [would] come from a Sierra Leonean expert [...], given its distinct social and cultural consequences and uniqueness to the Sierra Leone conflict. According to the Prosecution, the Sierra Leonean expert would be able to inform the Trial Chamber of the long-term social, cultural, physical and

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<sup>588</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Amended Consolidated Indictment) SCSL-04-15-PT “RUF Case” (13 May 2004) para 45-60, count 6-9.

<sup>589</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Indictment) SCSL-04-16-PT “AFRC Case” (05 February 2004) para 52-57; See also *RUF* Amended Consolidated Indictment (n 589) para 55-60.

<sup>590</sup> Clare Da Silva, ‘The Hybrid Experience of the Special Court for Sierra Leone’ in Bartram S Brown (ed), *Research Handbook on International Criminal Law* (Edward Elgar Publishing 2011) 242; Cecily Rose, ‘Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-based Crimes’ (2009) 7 *Journal of International Criminal Justice* 353, 354; Crane’s initial understanding of the conflict, together with budgetary and time constraints as well as the Special Court’s restrictive mandate and the prosecution’s interpretation thereof generally led to broad and imprecise indictments, resulting in slow trials. The first chief prosecutor is also criticised for his rhetorical and emotive approach, as well as the over-simplification of, and disregard for, the relationship between violence perpetrated during the conflict and factors such as poverty, corruption and mismanagement of state institutions.

<sup>591</sup> *AFRC* Trial Judgment (n 23): The *AFRC* case was before the judges Julia Sebutinde, Richard Lussick and Teresa Doherty. Members of the Office of the Prosecutor involved were Karim Agha, Christopher Staker, Charles Hardaway, Lesley Taylor, Melissa Pack, Vincent Wagana and Shyamala Alagendra. Therefore, while two out of three judges were women, the representatives of the prosecution were mainly men.

<sup>592</sup> Rose (n 590) 368-369.

<sup>593</sup> *AFRC* Decision on Prosecution request for leave to call an additional witness (n 571) para 12.

psychological meanings and consequences of forced marriage within the Sierra Leonean context.”<sup>594</sup>

Bangura’s experience as a women’s advocate and activist in the national and international arena further qualified her for the task. As a member of the Sierra Leonean Campaign for Good Governance, she became involved in the provision of medical and legal services for (ex-)forced wives and worked towards their rehabilitation and reintegration. As a community empowerment consultant for the Office of the United Nations High Commissioner for Refugees in Sierra Leone, Bangura interviewed internally displaced women and returnee women, including (ex-)forced wives. Therefore, her report benefitted from first-hand witness testimonies.

In her report, Bangura highlighted that the

“conflict [...] affected women directly in diverse ways. [...] However, the most devastating effect on women [...] was the phenomenon called ‘bush wife’ [...]. This was a phenomenon adopted by rebels whereby young girls or women were captured or abducted and forcibly taken as ‘wives’.”<sup>595</sup>

Bangura elaborated that no official marriage ceremony took place and neither the woman’s nor her parents’ consent was sought.<sup>596</sup> As a forced wife, a woman had to be sexually available to her forced husband, cook, wash his clothes and carry his possessions when they moved.<sup>597</sup> Forced husbands did not show their forced wives respect and the forced husband always had the final say. Forced wives had to endure continuous physical and psychological abuse without having a way to address the brutality of their forced husbands. A forced wife was at the mercy of her forced husband. Forced wives had no security. Forced husbands could abandon them whenever they wanted to. Forced wives were led to believe that their forced husbands had the right to kill them without fear of any repercussions.<sup>598</sup> The “[u]se of the words ‘wife’ by the perpetrators was deliberate and strategic. The word ‘wife’ demonstrated a rebel’s control over a woman; his psychological

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<sup>594</sup> *AFRC* Decision on Prosecution request for leave to call an additional witness (n 571) para 1, para 5.

<sup>595</sup> *AFRC* Prosecution Filing of Expert Report (n 570) 6.

<sup>596</sup> *AFRC* Prosecution Filing of Expert Report (n 570) 13.

<sup>597</sup> *AFRC* Prosecution Filing of Expert Report (n 570) 14.

<sup>598</sup> *AFRC* Prosecution Filing of Expert Report (n 570) 13.

manipulations of her feelings rendered her unable to deny his wishes.”<sup>599</sup> It showed that a forced wife belonged to her forced husband and was expected to have an exclusive relationship with him. This also meant that forced wives were spared from acts of sexualised violence perpetrated by other men. A breach of the exclusive relationship was severely punished.<sup>600</sup> After the conflict, many forced wives continue to have no livelihood and stay with their forced husband. This impacts on the psychological trauma they suffered as forced wives. Children born from forced marriage further impede (ex-)forced wives’ opportunities for a fresh start, including a new marriage. Fear of discrimination and stigmatisation as rebels often prevents (ex-)forced wives from returning to their families and communities. This results in the breakdown of family ties.<sup>601</sup>

Influenced by Bangura’s report, the SCSL’s prosecution under Stephen Rapp defined the crime of forced marriage gender-neutrally as a fairly clear-cut act that

“consists of words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.”<sup>602</sup>

The prosecution argued that forced marriage usually involves sex but, in comparison to sexual slavery, it has its own distinctive feature: a person is forced by threat or coercion into what appears to be a marriage. The prosecution further stated the view that

“sexual slavery does not necessarily amount to forced marriage, in that a sexual slave is not necessarily obliged to pretend that she is the wife of the perpetrator. Similarly, a victim of sexual violence is not necessarily obliged to perform all the tasks attached to a marriage.”<sup>603</sup>

Therefore, the prosecution understood forced marriage to be of similar gravity as the other crimes against humanity under the Special Court’s jurisdiction and sufficiently serious to

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<sup>599</sup> *AFRC* Prosecution Filing of Expert Report (n 570) 15.

<sup>600</sup> *AFRC* Prosecution Filing of Expert Report (n 570) 13-15.

<sup>601</sup> *AFRC* Prosecution Filing of Expert Report (n 570) 15-21.

<sup>602</sup> Prosecution Final Brief para 1009-1012 as cited in *AFRC* Trial Judgment (n 23) para 701.

<sup>603</sup> *AFRC* Trial Judgment (n 23) para 701.

qualify as an inhumane act.<sup>604</sup> The Kanu defence disagreed with this assessment.<sup>605</sup> Already in its decision on the prosecution's request for leave to amend the indictment, the Trial Chamber conveyed an understanding of forced marriage as a sexual or gender crime akin to rape, sexual slavery or sexual violence.<sup>606</sup> Making this even clearer, Judge Sebutinde in her Separate Concurring Opinion on the Trial Chamber's Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 observed that sexual elements of a forced marriage dominate over non-sexual ones.<sup>607</sup> Retaining the focus on sexual elements, the Trial Chamber eventually found that even though at first glance there was evidence that a forced marriage also consists of non-sexual elements, it was "not satisfied that the evidence adduced by the Prosecution was capable of establishing [these] elements [...] of 'forced marriage' independent of the crime of sexual slavery under Article 2(g) of the Statute."<sup>608</sup> Like slavery for the purpose of physical labour, it understood slavery for the purpose of sexual abuse to be a specific form of the *jus cogens* prohibition of slavery.<sup>609</sup> Drawing on the *Foča* case, the Trial Chamber defined a situation as sexual slavery when

“(1) [t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty [and when]  
 (2) [t]he perpetrator caused such person or persons to engage in one or more acts of a sexual nature”.<sup>610</sup>

The Trial Chamber found that the use of the term 'wife' was one element of a forced marital relationship that was one of ownership and one-sided exclusivity where the forced husband exercised control over the forced wife's sexuality, movements and labour. Therefore, the majority of the Trial Chamber found that the evidence presented by the

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<sup>604</sup> *AFRC Trial Judgment* (n 23) para 701; SCSL statute (n 547) art 2(i).

<sup>605</sup> *AFRC Trial Judgment* (n 23) para 702.

<sup>606</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Decision on Prosecution Request for Leave to Amend the Indictment) SCSL SLS-2004-16-PT "AFRC Case" (06 May 2004) para 51-52.

<sup>607</sup> *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (Separate Concurring Opinion on the Trial Chamber's Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98) SCSL-04-16-T "AFRC Case" (31 March 2006) para 19(iii).

<sup>608</sup> *AFRC Trial Judgment* (n 23) para 704.

<sup>609</sup> *AFRC Trial Judgment* (n 23) para 705.

<sup>610</sup> *AFRC Trial Judgment* (n 23) para 708.

prosecution was completely covered by the crime of sexual slavery and that there was no gap in the law which would require the creation of a separate crime of forced marriage as an inhumane act.<sup>611</sup> Influenced by Mrs Bangura's report, Judge Teresa Doherty reached a different conclusion. Like the prosecution, she was of the opinion that forced marriage constituted a crime separate from that of sexual slavery. Judge Doherty stressed that there was evidence of situations where women were raped by various men but were not stigmatised as rebel wives.<sup>612</sup> She understood the label 'wife' to be "indicative of [a] forced marital status which had lasting and serious impacts on the victims. [T]he label of 'wife' to a rebel caused mental trauma, stigmatised the victims and negatively impacted their ability to reintegrate into their communities."<sup>613</sup> In contrast to the Trial Chamber's focus on sexualised and physical violence, Judge Doherty therefore emphasised the psychological suffering of the victim caused by the imposition of a forced conjugal association.<sup>614</sup> She concluded that "the *act* of forced marriage is of similar gravity and nature to the other enumerated crimes against humanity [...]. Accordingly, [...] forced marriage constitutes a crime against humanity."<sup>615</sup> Contrary to the categorisations of forced marriage suggested by the Trial Chamber and by Judge Doherty, forced marriage was ultimately considered to be evidence of sexual slavery under outrages upon personal dignity. This was due to the Trial Chamber's earlier dismissal of the count charging sexual slavery because of defective pleading.<sup>616</sup> Even though forced marriage severely harms the personal dignity of survivors, the category of outrages upon personal dignity does not satisfactorily match and adequately acknowledge the crime. Therefore, it is not necessarily in the interest of survivors.

Before the Appeals Chamber, the prosecution<sup>617</sup> challenged the Trial Chamber's conclusion that forced marriage is a form of sexual slavery rather than an inhumane act.<sup>618</sup>

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<sup>611</sup> *AFRC* Trial Judgment (n 23) para 713.

<sup>612</sup> *AFRC* Trial Judgment (n 23) Judge Doherty's Partly Dissenting Opinion para 50.

<sup>613</sup> *AFRC* Trial Judgment (n 23) Judge Doherty's Partly Dissenting Opinion para 51.

<sup>614</sup> *AFRC* Trial Judgment (n 23) Judge Doherty's Partly Dissenting Opinion para 52-53.

<sup>615</sup> *AFRC* Trial Judgment (n 23) Judge Doherty's Partly Dissenting Opinion para 69-70 (emphasis added).

<sup>616</sup> *AFRC* Trial Judgment (n 23) para 93-95, para 713-714, para 719, para 2113, para 2117, para 2121.

<sup>617</sup> *AFRC* Appeals Chamber Judgment (n 23): The members of the Office of the Prosecutor were Christopher Staker, Karim Agha, Chile Eboe-Osuji and Anne Althaus.

<sup>618</sup> *AFRC* Appeals Chamber Judgment (n 23) para 175.

The Appeals Chamber judges<sup>619</sup> noted that the prosecution might have misled the Trial Chamber by listing the charge of forced marriage as an inhumane act under the indictment heading ‘Sexual Violence’. However, the evidence it submitted did not support this understanding.<sup>620</sup> Following Bangura’s report, the Appeals Chamber found that

“[w]hile forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with a another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the ‘husband’ and ‘wife’, which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime.”<sup>621</sup>

Expanding on the harm suffered by forced wives as a result of the crimes committed within the forced marriage rather than as a result of being compelled into a forced conjugal association,<sup>622</sup> the Appeals Chamber stated that

“victims of forced marriage endured physical injury by being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty. Many were psychologically traumatised by being forced to watch the killing or mutilation of close family members, before becoming ‘wives’ to those who committed these atrocities and from being labelled rebel ‘wives’ which resulted in them being ostracised from their communities. In cases where they became pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation.”<sup>623</sup>

Here it becomes clear that, in contrast to the prosecution in the trial phase, the Appeals Chamber acknowledged that forced marriage is a complex and diffuse process rather than a distinct act.<sup>624</sup> It also recognised that by being forced into a conjugal association with

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<sup>619</sup> *AFRC Appeals Chamber Judgment* (n 23): The Appeals Chamber judges were George Gelaga King, Emmanuel Ayoola, Renate Winter, Raja Fernando and Jon M Kamanda.

<sup>620</sup> *AFRC Appeals Chamber Judgment* (n 23) para 181.

<sup>621</sup> *AFRC Appeals Chamber Judgment* (n 23) para 195.

<sup>622</sup> Nicholas Azadi Goodfellow, ‘The Miscategorization of “Forced Marriage” as a Crime against Humanity by the Special Court for Sierra Leone’ (2011) 11 *International Criminal Law Review* 831.

<sup>623</sup> *AFRC Appeals Chamber Judgment* (n 23) para 199.

<sup>624</sup> Considering whether forced marriage is framed as a distinct act or a complex and diffuse process becomes interesting when comparing forced marriage to rape. It can be claimed that rape can be more easily translated



another person a forced wife is intrinsically as well as extrinsically bound by the forced husband through being forced or coerced into staying with him as well as through the shift in her legal, social and religious status and rights.<sup>625</sup> Both, the Trial and the Appeals Chamber emphasised that the relative benefits that forced wives received from their forced husbands neither indicate consent to the forced marriage, “nor does it vitiate the criminal nature of the perpetrator’s conduct given the environment of violence and coercion in which these events took place.”<sup>626</sup>

Like Judge Doherty, the Appeals Chamber concluded that forced marriage is of similar gravity to the crimes against humanity listed under the SCSL’s statute and to be sufficiently serious to qualify as an inhumane act.<sup>627</sup> Even though the Appeals Chamber declined to enter a further conviction,<sup>628</sup> the categorisation of forced marriage as an inhumane act is viewed to adequately reflect the conduct’s distinctive and multifaceted nature. It also avoids a too narrow categorisation that misrepresents the nature of the offence. Forced marriage is understood as including sexual and non-sexual elements. Therefore, charging forced marriage as an inhumane act can be seen as a success for the feminist goal to challenge gender stereotypes.<sup>629</sup> It is recognition that, in times of armed conflict, women are not only affected by sexual, but also by other forms of violence. For these reasons, the understanding of forced marriage as an inhumane act serves survivors. However, classifying forced marriage as an inhumane act arguably conceals the serious violations it encompasses.<sup>630</sup> Despite this downside, naming ‘forced marriage’ as a crime is recognition of the reality of women during and after armed conflicts as they experience and

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into a narrow criminal act that is defined, for example, by coerced physical invasion. However, the argument can be made that this is the current, well-established, legal understanding of rape. Survivors, however, can struggle to fit their experiences into these narrow confines. Someone who experienced forced undressing, forced nudity or forced bodily contact may ‘feel raped’ even though these acts fall outside any legal definition of the crime. Moreover, similar to forced marriage, rape has various serious long-term consequences for the survivor as well as for her social environment that cannot be disconnected from the coerced physical invasion. Consequently, it can be argued that if the crime of rape would have been defined differently, more broadly, it may be perceived as a process comparable to the understanding of forced marriage advanced by the *AFRC* Appeals Chamber and the *Taylor* Trial Chamber. Following on from this, forced marriage may only be perceived as a complex and diffuse process now because it is still undergoing legal definition. Would it be as well-theorised and would its definition be as well-established as that of rape, it may be seen differently.

<sup>625</sup> *AFRC* Appeals Chamber Judgment (n 23) para 195.

<sup>626</sup> *AFRC* Appeals Chamber Judgment (n 23) para 190.

<sup>627</sup> *AFRC* Appeals Chamber Judgment (n 23) para 200.

<sup>628</sup> *AFRC* Appeals Chamber Judgment (n 23) 105.

<sup>629</sup> Bunting (n 69) 179; Kristastout (n 59); Toy-Cronin (n 59) 565.

<sup>630</sup> Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 55).

understand it. It legitimises women's experiences and consequently empowers them.<sup>631</sup> By naming 'forced marriage' as a crime, it was "publicly and authoritatively transformed from a legally unacknowledged harmful experience into an acknowledged wrong requiring legal redress".<sup>632</sup> The term 'forced marriage' makes it easier to identify and stress the distinctive harms associated with it. It recognises an "interrelated, whole conduct which might otherwise be only viewed in parts."<sup>633</sup> 'Forced marriage' "provid[es] a single name for the larger overarching harm associated with a particular collection of offences and therefore captur[es], in one definition, harm that other international criminal law terms do not adequately or fully capture."<sup>634</sup> This conveys an understanding of forced marriage as more than the sum of its parts. The totality makes it a distinct crime that cannot be adequately captured in a collection of separate charges. However, when following this approach, it is crucial to determine the constituent crimes of a forced marriage on a case-by-case basis so as to cover different forms of forced marriage.<sup>635</sup> In contrast to these advantages of naming the conduct 'forced marriage', it can be argued, that the use of the noun 'marriage' hides the degree of violence, coercion and control as well as the exploitation of gender roles that is characteristic of a forced marriage. Since mutual consent is seen as crucial to a marriage, the use of the noun 'marriage' suggests a degree of voluntarism, stigmatising the woman and downplaying the responsibility of the perpetrator. It suggests that the services a forced wife renders to her forced husband are offered as part of a marriage arrangement rather than forced. However, as discussed below in relation to *Prosecutor v Charles Taylor*, the adjective 'forced' can be interpreted to show that the noun 'marriage' is a perversion of what marriage really means.

#### 5.4.3.2 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF case)*

Following the Appeals Chamber's definition of forced marriage in the *AFRC* case, the indictment against Issa Hassan Sesay, Morris Kallon and Augustine Gbao (*RUF* case) was amended to include charges of forced marriage as an inhumane act constituting a

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<sup>631</sup> *ibid.*

<sup>632</sup> Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55) 139.

<sup>633</sup> Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55) 142.

<sup>634</sup> Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55) 144.

<sup>635</sup> Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55).

crime against humanity under Article 2(i) of the Special Court's statute. In addition, other sexual violence charges included rape and sexual slavery and any other forms of sexual violence as crimes against humanity under Article 2(g) of the SCSL statute and outrages upon personal dignity as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>636</sup>

The Trial Chamber judges<sup>637</sup> in the *RUF* case confirmed the prosecution's statement<sup>638</sup> and the Appeals Chamber's finding in the *AFRC* case that "'forced marriage' is not subsumed by sexual slavery."<sup>639</sup> The Trial Chamber took a gender-neutral approach and determined the objective element of forced marriage to be the "imposition of a forced conjugal association".<sup>640</sup> This imposition of a forced conjugal status was understood as a distinct act including being married against the woman's will and forced to engage in sexual intercourse and to perform domestic tasks,<sup>641</sup> rather than the diffuse process that was indicated by the *AFRC* Appeals Chamber in its judgment. Contrary to these clear statements, however, the prosecution under Stephen Rapp confirmed Bangura's opinion that "the use of the term 'wife' by the rebels was deliberate and strategic, with the aim of enslaving and psychologically manipulating the women and with the purpose of treating them like possessions."<sup>642</sup> Here, an inconsistent understanding of forced marriage becomes evident. On the one hand, the prosecution stressed the psychological element of the crime, which supports an understanding of forced marriage as an inhumane act. On the other hand, it also reaffirmed the purpose of forced marriage as imposing a relationship of ownership on the forced wife, supporting an understanding of forced marriage as a form of sexual slavery.

The Trial Chamber in the *RUF* case also agreed with the Appeals Chamber in the *AFRC* case and found that serious physical and psychological injuries are inflicted upon

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<sup>636</sup> *RUF* Amended Consolidated Indictment (n 589) counts 8-9; *RUF* Trial Judgment (n 24) para 164, para 460.

<sup>637</sup> *RUF* Trial Judgment (n 24): The Trial Chamber judges in the *RUF* case were Pierre Boutet, Benjamin Mutanga Itoe and Bankole Thompson. They were joined by Pete Harrison, Vincent Wagona, Charles Hardaway, Reginald Fynn, Elisabeth Baumgartner, Régine Gachoud, Amira Hudroge and Bridget Osho representing the Office of the Prosecutor. For the first time in the Special Court cases under discussion here, the members of the Office of the Prosecutor were equal in numbers in terms of sex.

<sup>638</sup> *AFRC* Decision on Prosecution Request for Leave to Amend the Indictment (n 606) para 12.

<sup>639</sup> *RUF* Trial Judgment (n 24) para 2307.

<sup>640</sup> *RUF* Trial Judgment (n 24) para 1295.

<sup>641</sup> *RUF* Trial Judgment (n 24) para 1293.

<sup>642</sup> *RUF* Trial Judgment (n 24) para 1466.

forced wives that lead to great suffering.<sup>643</sup> Therefore, it was “satisfied that AFRC/RUF rebels forced an unknown number of women into marriages [...], which [...] constitute inhumane acts”.<sup>644</sup> Evidence of forced marriage was heard to establish the crime of outrages upon personal dignity but the defendants were not prosecuted on it.<sup>645</sup> The Trial Chamber also used evidence of forced marriage to prove acts of terror, constituting a war crime.<sup>646</sup>

#### 5.4.3.3 *Prosecutor v Charles Taylor*

In the *Taylor* judgment, the Trial Chamber<sup>647</sup> noted that, contrary to the *AFRC* and *RUF* cases, “‘forced marriage’ [as an inhumane act was] not charged” here.<sup>648</sup> In contrast, Charles Taylor was charged with,<sup>649</sup> and later convicted of, planning, aiding and abetting crimes against humanity of rape and sexual slavery as well as the war crime of committing outrages upon personal dignity committed by rebel forces in Sierra Leone.<sup>650</sup> Evidence related to forced marriage was considered with regard to these charges and with regard to relevant jurisprudence of the SCSL.<sup>651</sup> Following the definition of sexual slavery developed in the *AFRC* case,<sup>652</sup> the judgment assisted in solidifying the international legal definition of sexual slavery and helped define its contours.<sup>653</sup> Confirming the list of indicia for enslavement developed by the ICTY in the *Foča* case, the Trial Chamber determined

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<sup>643</sup> *RUF* Trial Judgment (n 24) para 1296.

<sup>644</sup> *RUF* Trial Judgment (n 24) para 1297.

<sup>645</sup> *RUF* Trial Judgment (n 24) para 1474-1475.

<sup>646</sup> *RUF* Trial Judgment (n 24) para 1352.

<sup>647</sup> *Taylor* Trial Judgment (n 25): Like the *AFRC* case, the *Taylor* case was before the judges Julia Sebutinde, Richard Lussick and Teresa Doherty. Members of the Office of the Prosecutor involved were Brenda J Hollis, Nicholas Koumjian, Mohamed Bangura, Kathryn Howarth, Leigh Lawrie, Ruth Mary Hackler, Ula Nathai-Lutchman, Nathan Quick, Maja Dimotrova and James Pace. This is the first of the Special Court cases discussed here where more women than men represented the prosecution.

<sup>648</sup> *Taylor* Trial Judgment (n 25) para 422.

<sup>649</sup> *Prosecutor v Charles Taylor* (Indictment) SCSL-2003-01-I (07 March 2003) para 39-43, counts 6-8; *Prosecutor v Charles Taylor* (Second Amended Indictment) SCSL-03-01-PT (29 May 2007) para 5.

<sup>650</sup> *Prosecutor v Charles Taylor* (Summary Judgment) SCSL-03-1-T (26 April 2012) para 181; SCSL statute (n 547).

<sup>651</sup> *Taylor* Trial Judgment (n 25) para 422.

<sup>652</sup> *Taylor* Trial Judgment (n 25) para 418.

<sup>653</sup> *Taylor* Trial Judgment (n 25) para 418-421.

that “[t]here is no requirement that there be any payment or exchange in order to establish the exercise of ownership.”<sup>654</sup> Thus, it helped settle an issue which arose in the ICC negotiations.<sup>655</sup> Following the *Foča* case further, the Trial Chamber also acknowledged that the expression ‘similar deprivation of liberty’ covers

“[extracting forced labour or otherwise reducing a person to a servile status as well as] situations in which the victims may not have been physically confined, but were otherwise unable to leave the perpetrator’s custody as they would have nowhere else to go and feared for their lives.”<sup>656</sup>

Illustrating that the context of ownership may differ not only between, but also within, situations, the Trial Chamber observed that the sexual slavery system in Sierra Leone had a hierarchy of ownership.<sup>657</sup> Further following Bangura’s report, the Trial Chamber also stressed that sexual slavery is a continuing crime that includes a number of actions that can stretch over a long period of time in many different locations, rather than a discrete event.<sup>658</sup> These clarifications show that sexual slavery is understood broadly as a process. It could encompass forced marriage in times of armed conflict where women are abducted rather than exchanged for money. Forced wives are subjected to forced labour and have to serve their husbands sexually and otherwise. To carry out their tasks, they have to leave the house or camp. Therefore, they are not physically confined but still unable to leave and with no place to go due to coercion and stigmatisation. This is also true for forced wives of commanders who are accorded higher status and special treatment. Due to coercion, fear and/or socio-economic considerations, forced wives stay with their forced husbands for long periods of time; sometimes even after the conflict has ended.

The Trial Chamber found that the evidence related to forced marriage heard in the *Taylor* case satisfied the elements of sexual slavery.<sup>659</sup> Fighters exercised rights of ownership over their forced wives by depriving them of their liberty, forcing them to work for the fighters’ and group’s benefit. Additionally, forced wives were subjected to various

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<sup>654</sup> *Taylor* Trial Judgment (n 25) para 420.

<sup>655</sup> See sections 7.3.3.2, 7.3.3.4 and 7.3.3.5 as well as part 7.5 for further discussion of the question whether any payment or exchange is necessary in order to establish the crime of sexual slavery.

<sup>656</sup> *Taylor* Trial Judgment (n 25) para 420.

<sup>657</sup> *Taylor* Trial Judgment (n 25) para 1185, para 2175.

<sup>658</sup> *Taylor* Trial Judgment (n 25) para 119, para 890, para 912, para 1018.

<sup>659</sup> *Taylor* Trial Judgment (n 25) para 426.

acts of sexualised violence.<sup>660</sup> However, the Trial Chamber also expressed the view that acts constituting forced marriage were not limited to sexual forms of slavery. Therefore, it suggested that the term “conjugal slavery best describes these acts, and while they may constitute more than sexual slavery, they nevertheless satisfy the elements of sexual slavery.”<sup>661</sup>

Here it becomes apparent that the judgment raised important questions about what the SCSL had previously termed ‘forced marriage’. The Trial Chamber stressed that the term ‘forced marriage’ is a misnomer because there is no actual marriage.<sup>662</sup>

“What happened to the girls and women abducted in Sierra Leone and forced into this conjugal association was not marriage in the universally understood sense of a consensual and sacrosanct union, and should rather, in the Trial Chamber’s view, be considered a conjugal form of enslavement.”<sup>663</sup>

This view serves patriarchal structures as marriage is considered too important and fundamental to be interfered with, preserving men’s traditional power position in the private sphere. The Trial Chamber went on to explain that conjugal slavery

“has two main intertwined aspects [, a dual purpose]: sexual slavery and forced labour in the form of domestic work [para. 424-425]. Thus, what has been referred to as ‘forced marriage’ is actually two different forms of enslavement imposed through forced conjugal association”.<sup>664</sup>

The Appeals Chamber continued to elaborate that conjugal slavery also includes the perpetrator labelling a victim his wife and the exercise of exclusive sexual control over her.<sup>665</sup> Therefore, conjugal slavery encompasses

“two kinds of harm: first, the harm caused by the non-consensual conferral of the status of ‘marriage’ on the victim and the resulting personal damage

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<sup>660</sup> *Taylor* Trial Judgment (n 25) para 1102, para 1144.

<sup>661</sup> *Taylor* Trial Judgment (n 25) para 428.

<sup>662</sup> *Taylor* Trial Judgment (n 25) para 425-426.

<sup>663</sup> *Taylor* Trial Judgment (n 25) para 427.

<sup>664</sup> Valerie Oosterveld, ‘Taylor Judgment & Gender-Based Crimes’ (IntLawGrrls, 01 May 2012) <<http://www.intlawgrrls.com/2012/05/taylor-judgment-gender-based-crimes.html>> accessed 17 June 2014; See also *Taylor* Trial Judgment (n 25) para 427.

<sup>665</sup> *Taylor* Trial Judgment (n 25) para 430; Valerie Oosterveld, ‘Gender and the Charles Taylor Case at the Special Court for Sierra Leone’ (2012) 19 William & Mary Journal of Women and the Law 7, 22-23.

(especially societal stigmatization); and second, the physical and psychological harms associated with the rape, forced pregnancy, forced labor, and other duties associated with being a 'wife'.”<sup>666</sup>

The Trial Chamber emphasised that conjugal slavery is not meant to be a new crime with additional elements.<sup>667</sup> Blurring the line between the intertwined sexual and non-sexual aspects integrated in conjugal slavery,<sup>668</sup> the Trial Chamber viewed the crime as a

“distinctive form of the crime of sexual slavery with the additional component described by the Appeals Chamber [in the *AFRC* case]. However, the Trial Chamber [was] of the view that this additional component, which relates to forced conjugal labour, is simply a descriptive component of a distinctive form of sexual slavery. It is not a definitional element of a new crime, in the same way that gang rape is a distinctive form of rape, yet nevertheless falls within the scope of the crime of rape.”<sup>669</sup>

The categorisation of forced marriage as a form of sexual slavery serves conservative forces within International Law that prefer relying on legal precedents to potentially developing new law. It neglects that forced marriage is not (only) an exercise of powers attaching to the right of ownership.<sup>670</sup> The categorisation of forced marriage as a form of sexual slavery also perpetuates stereotypes that women primarily experience war as victims of sexual violence. It creates the false impression that forced marriage would predominantly be a sexualised crime. The categorisation of forced marriage as a form of sexual slavery ignores the gendered elements of forced marriage. Women are targeted because of their ascribed social roles as domestic workers, caretakers and sexual beings.<sup>671</sup> The categorisation of forced marriage as a form of sexual slavery does not capture the forced exclusivity and intimacy of a forced marriage. It disregards the psychological force of acts of violence being disguised within the legitimate situation of marriage. Forced marriages cause different forms of suffering than sexual slavery and cause survivors to be discriminated against in unique ways. The woman is forced into marriage with a person

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<sup>666</sup> Oosterveld, 'Gender and the Charles Taylor case' (n 665) 18.

<sup>667</sup> *Taylor* Trial Judgment (n 25) para 430.

<sup>668</sup> *Taylor* Trial Judgment (n 25) para 424.

<sup>669</sup> *Taylor* Trial Judgment (n 25) para 429.

<sup>670</sup> Section 5.4.2 and part 5.3 set out that forced marriage can be interpreted as an exercise of powers attaching to the right of ownership.

<sup>671</sup> Kristastout (n 59) 23.

who often committed terrible atrocities against her family. They are forced into exclusivity and intimacy while at the same time they experience on-going abuse from the same person. The label ‘marriage’ attached to this relationship manipulates forced wives into loyalty towards their forced husbands. It renders them unable to deny their forced husband’s wishes and makes them feel saved from more abuse by other fighters. Children born into forced marriages make forced wives dependent on their forced husbands even after the conflict has ended. This is aggravated by the social stigmatisation and exclusion the women experience from their families and communities as they are seen as collaborators, rebels and killers. This perception is based on the fact that forced wives often participated in direct combat. They are victims, witnesses and perpetrators of war violence. Consequently, forced marriage could rather be understood as ‘sexual slavery plus’.

The Taylor judgment makes clear that the Trial Chamber analysed the evidence of forced marriage under two categories. The evidence of sexual violence including rape was considered under the charge of sexual slavery. The evidence of forced labour, in contrast, was considered under the enslavement charge.<sup>672</sup> This approach better reflects the acts intended to be captured by the term ‘forced marriage’. The construction of the constituting elements of forced marriage as two forms of enslavement highlights that the crime consists of sexual and non-sexual aspects. It confirms the acts of violence perpetrated against forced wives as serious crimes while avoiding the drawbacks of classifying forced marriage as a form of sexual slavery. A disadvantage, however, would be that enslavement does not immediately highlight the gendered dimension of the crime. Moreover, the experiences of forced wives would be fragmented into different forms of enslavement. Additionally, (ex-)forced wives are unlikely to self-identify with the label of enslavement.<sup>673</sup>

The SCSL cases discussed above indicate that forced marriages are formed in times of armed conflict because women are needed to perform women’s work such as cooking and cleaning. Forced marriages also are a means to exercise control over women beyond their household duties. Moreover, forced marriages create dependency structures within a fighting group while at the same time destroying traditional family and community ties.

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<sup>672</sup> *Taylor* Second Amended Indictment (n 649) para 23-27; *Taylor* Trial Judgment (n 25) para 447-448, para 1698-1699.

<sup>673</sup> Oosterveld, ‘Forced Marriage and the Special Court for Sierra Leone’ (n 55).



Part 5.5 below shows that these explanations for the causes and meanings of forced marriage also reflect theoretical considerations regarding the causes and meanings of the crime.

### *5.5 Theoretical considerations regarding the causes and meanings of forced marriage*

The following sections explore different theoretical explanations for the causes and meanings of the crime of forced marriage such as the wish to control someone's sexuality, peacetime marriage conventions being pushed into the context of conflict, the aim to demoralise and disable the opponent, the need for women to perform women's work, the creation of bonds within the fighting group, the lack of material wealth of fighting groups, and the importance of social status. Section 5.5.2 advances a new explanation of the causes and meanings of forced marriage based on hegemonic masculinity theory and examples from Uganda.

When discussing the causes and meanings of forced marriage in times of armed conflict, parallels can be drawn to explanations of the causes and meanings of war rape. The perpetration of forced marriages and war rapes can be ascribed to essentialist understandings of men as aggressive hunters and women as submissive gatherers (individual causes). Forced marriages and war rapes are seen as forms of compensation or reward for successful fighters. The perpetration of both crimes can be ascribed to unequal power relationships where men are seen as powerful and women as powerless (interpersonal and structural causes). These exist in peacetime and are exacerbated in times of war, indicating a continuum of sexualised violence perpetrated against women in peace and war. Forced marriages and war rapes target women because of their membership in a particular social category as well as for economic reasons (structural causes). Forced marriages and war rapes are also a form of political violence, aiming at the destruction of the opponent. Within one's own group, peer pressure can explain the perpetration of war rapes and forced marriage. The perpetration of both crimes can also be ascribed to different ideals of masculinity (structural causes). A notable difference is found in the fact that forced marriages, in contrast to war rapes, are perpetrated to create lasting interpersonal bonds.

### *5.5.1 Various perspectives of the causes and meanings of forced marriage in times of armed conflict*

Following the SCSL, the wish to gain control over someone's sexuality is established as a key personal motive for the perpetration of forced marriage in peace and wartime.<sup>674</sup> In times of armed conflict, this argument works in two ways. On the one hand, male fighters aim to control women's sexuality to strengthen their power positions. On the other hand, male fighters' sexuality has to be controlled to refrain from the rape of female civilians. Indicating institutional and structural causes of the perpetration of forced marriage in times of armed conflict as a form of political violence, the leadership of the Ugandan Lord's Resistance Army (LRA),<sup>675</sup> for example, aims to create a new Acholi<sup>676</sup> nation and a new social order. As adultery is prohibited in this new social order, forced marriage was a means to give birth to the new Acholi nation. Severe punishment for breach of rules deters rapes of civilian women.<sup>677</sup> Comparably to the LRA, rape was officially prohibited to control male fighters and the domestic realm in the RUF. Rape was seen as a counter-revolutionary threat to the group's cohesion and efficacy. Forced marriage, in contrast, was tolerated and even encouraged. It offered stability and domesticity. Sexual intercourse in marriage had social and moral legitimacy, which made marital rape normatively impossible.<sup>678</sup> This indicates that men exercise control over women's sexuality. In forced marriages, it is the forced husband who unilaterally decides the terms and conditions of the couple's sex life. While it is acceptable and even desirable for the forced husband to have more than one wife as it increases his status in the fighting group, exclusivity is expected of forced wives. A breach of this partly exclusive arrangement by forced wives is severely punished.<sup>679</sup>

Another structural explanation links the perpetration of forced marriages in times of armed conflict to the peacetime convention of marriage by capture (interpersonal violence). It is argued that these peacetime conventions are simply pushed into the context

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<sup>674</sup> Chantler (n 490) 177; Dauvergne and Millbank (n 491).

<sup>675</sup> The LRA is a Ugandan fighting group. For further information see for example Bernd Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (Zed Books 2010).

<sup>676</sup> Erin Baines, 'Forced Marriage as a Political Project: Sexual Rules and Relations in the Lord's Resistance Army' (2014) 51 *Journal of Peace Research* 405. The Acholi are an ethnic group from Northern Uganda.

<sup>677</sup> Baines (n 676) 406, 412.

<sup>678</sup> Zoe Marks, 'Sexual Violence in Sierra Leone's Civil War: "Virgination", Rape, and Marriage' (2013) 112 *African Affairs* 67, 71-74.

<sup>679</sup> *AFRC Appeals Chamber Judgment* (n 23) para 195; Kramer (n 489).

of conflict.<sup>680</sup> However, the way forced wives are treated upon return to their families and communities is contrary to the understanding of forced marriage in times of armed conflict as based on peacetime marriage practices. Survivors of forced marriage in times of armed conflict are shunned, forced to abandon their children and to participate in traditional cleansing ceremonies to wash away their guilt and experiences of sexualised violence. These reactions make it very clear that forced marriage in times of armed conflict cannot be understood as an extension of culturally accepted peacetime practices of marriage.<sup>681</sup> On the contrary, forced marriage in the LRA

“purposefully violates Acholi sociality. Without the consent of the woman and man, and without the formal processes cementing the relationships of their lineages, women are not only coerced into marriage, but have no rights or recourse within it. The practice can therefore only be understood as a violation of customary practices regarding marriage”.<sup>682</sup>

Moreover, it can be seen to be motivated by the aim to demoralise and disable the opponent by dissolving traditional and cultural bonds between families and within society.<sup>683</sup> This establishes forced marriage as a form of social and political violence, targeting women who belong to a particular social group to reach the political goal of demoralising and disabling this group.

Focusing on women and their traditional roles, it is argued that forced marriages are coerced because fighting forces need women to perform women’s work as sexual partners, mothers to the children born from forced marriages, domestics, cooks, porters, water collectors, and food producers and gatherers (interpersonal cause of forced marriage).

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<sup>680</sup> Allen and Schomerus (n 488) 24; Kramer (n 489) 26-27; Leatherman (n 495) 41.

Barbara Ehrenreich (n 476) stressed that, historically, marriage by capture has been widely practiced in the sense that it had no geographic or religious boundaries. In ancient Rome for example, marriage rituals re-enacted and celebrated the rape of the Sabine women. This followed the understanding that women had to be tamed through marriage and motherhood. In addition, marriage was used as a means to build alliances between hostile clans or states.

<sup>681</sup> Allen and Schomerus (n 488) 24; Carlson and Mazurana (n 6) 51, 61; The Justice and Reconciliation Project, ‘Young Mothers, Marriage, and Reintegration in Northern Uganda: Considerations for the Juba Peace Talks’ (2006) Liu Institute for Global Issues and the Gulu District NGO Forum, The Justice and Reconciliation Project Field Notes, No. 2 3 <[http://www.ligi.ubc.ca/sites/liu/files/Publications/23Oct2006\\_YoungMothers\\_JRP.pdf](http://www.ligi.ubc.ca/sites/liu/files/Publications/23Oct2006_YoungMothers_JRP.pdf)> accessed 08 July 2013; Kramer (n 489) 27.

<sup>682</sup> Baines (n 676) 409.

<sup>683</sup> Lynn L Amowitz and others, ‘Prevalence of War-Related Sexual Violence and Other Human Rights Abuses Among Internally Displaced Persons in Sierra Leone’ (2002) 287 *Journal of the American Medical Association* 513, 520.

However, women also break traditional gender roles – and are expected to do so – when they participate in direct combat and perform military support tasks.<sup>684</sup> Contrary to the effect forced marriages have on traditional and cultural interpersonal bonds, they also are of vital importance to the group as they create families and consequently bonds within, and dependency on, the fighting group. Forced wives depend on their forced husband for protection from assaults by other fighters. Forced pregnancies and children born into these unions further reinforce women's dependency on their forced husband and the fighting group. This becomes very clear when considering that in Sierra Leone and Uganda, fighters' widows were allowed to remain single but opted for a new marriage with another fighter in hope for socio-economic support for themselves and their children. In fighting groups in both countries, families were also established by adopting young female abductees who became domestic slaves and subsequently, when reaching puberty, forced wives to commanders. Since these structures of dependency minimise the likelihood of escape of abductees and forced wives and strengthen unit cohesion, forced marriages were highly valued in fighting groups.<sup>685</sup>

Since women also serve as a means of compensation and reward for fighters' bravery and upon military success, forced marriage also has to be seen in the context of a fighting group's economic situation. Against the background of a lack of material wealth, women serve as a substitute, low-cost payment system that simultaneously boosts fighters' morale.<sup>686</sup> This argument highlights that forced marriage has structural causes in the sense that it is connected to a fighting group's economic structure and in the sense that it is a form of economic violence.

Another attempt to explain the motivation for the perpetration of the crime of forced marriage in times of armed conflict centres on men's self-perception and the establishment and maintenance of their power positions (personal, interpersonal and structural causes of forced marriage). Especially older fighters in higher ranks maintain a decadent lifestyle in which they have authority, easy access to resources and a choice of wives. As mentioned above, like in peacetime, the number of forced wives is understood as

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<sup>684</sup> Carlson and Mazurana (n 6) 14; Coulter (n 52) 79-80; Kramer (n 489) 25.

<sup>685</sup> Annan and Blattman (n 571) 140; Annan and others (n 571) 9; Baines (n 676) 408-410; Bernd Beber and Christopher Blattman, 'The Logic of Child Soldiering and Coercion' (2011) <<http://chrisblattman.com/documents/research/2011.LogicOfChildSoldiering.pdf>> accessed 23 December 2012 18; Carlson and Mazurana (n 6) 4-15; Kramer (n 489) 28-29.

<sup>686</sup> Annan and Blattman (n 571) 140; Annan and others (n 571) 9; Beber and Blattman (n 685) 18; Carlson and Mazurana (n 6) 4-15; Kramer (n 489) 28-29.

a status symbol.<sup>687</sup> Joseph Kony serves as an example. As the leader of the LRA, Kony holds a level of power and influence he would not enjoy otherwise. However, the personal benefits he derives from the accumulation of about forty handpicked wives – in contrast to the commanders’ five and the low-level fighters’ one or two wives – cannot explain the engagement in forced marriages throughout the LRA. It has to be questioned why he would give any wives to his fighters instead of taking all women for himself if his personal benefit was the only driving force behind the perpetration of forced marriage.<sup>688</sup>

### 5.5.2 Hegemonic masculinity and forced marriage

The above-mentioned understanding that forced marriages are formed in times of armed conflict because women are needed to perform women’s work as well as the understanding of forced marriage as based on peacetime norms of marriage and masculinity can be developed further when applying RW Connell’s theory of hegemonic masculinity<sup>689</sup> to Uganda. This also highlights personal, interpersonal and structural causes of the perpetration of forced marriage in times of armed conflict. Based on hegemonic masculinity theory, forced marriage can be understood as a way for men to ‘have it all’. It is a way for men to strive to fulfil the masculine ideal of financial independence, marriage and parenthood and to be the provider for, and protector of, wives and children. Men in fighting groups do not only need women to perform women’s work, but to fulfil their gender roles so that men can fulfil theirs. Rather than explaining forced marriage in times of armed conflict as peacetime marriage practices being pushed into the context of conflict, it is gender norms that are pushed into the context of conflict. While forced wives are a status symbol for fighters, demonstrating their power position, they also mark their status as adults and men. Explaining why forced marriages are formed in times of armed conflict based on hegemonic masculinity theory adds to the existing explanations, contributing to a

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<sup>687</sup> AFRC Prosecution Filing of Expert Report (n 570) 16; Coulter (n 52) 79-80; Barbara E Harrell-Bond, *Modern Marriage in Sierra Leone: A Study of the Professional Group* (Mouton 1975); Kramer (n 489) 26; Marks (n 678) 75; Refugee Law Project, ‘Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda’ (2004) Refugee Law Project Working Paper No. 11 18 <[http://www.refugeelawproject.org/files/working\\_papers/RLP.WP11.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP11.pdf)> accessed 08 July 2013.

<sup>688</sup> Kramer (n 489) 26; Refugee Law Project (n 687) 18.

<sup>689</sup> RW Connell, *Gender and Power: Society, the Person and Sexual Politics* (Polity Press 1987); RW Connell and James W Messerschmidt, ‘Hegemonic Masculinity: Rethinking the Concept’ (2005) 19 *Gender and Society* 829.

more comprehensive understanding of the causes and meanings of the crime. An analysis of the crime through the lens of hegemonic masculinity also offers an explanation as to why the crime of forced marriage is only perpetrated in certain regions of the world. Rather than being an extension of a highly patriarchal society in general where men hold a power position and exercise control over women, forced marriage in times of armed conflict is an expression of a thwarted hegemonic masculinity based on men's roles as husbands, fathers, providers and protectors. In regions where masculinity is based on different norms, the crime would be meaningless. Consequently, it is unlikely to be committed.

The following paragraphs outline the theory of hegemonic masculinity and analyse hegemonic masculinity in Uganda. Based on this, a new explanation for the causes and meanings of forced marriage in times of armed conflict is advanced. In addition to providing a new explanation, inconsistencies in existing ones are highlighted before limitations of hegemonic masculinity theory are considered.

#### *5.5.2.1 Hegemonic masculinity in theory*

Hegemonic<sup>690</sup> masculinity is the context-dependent ideal of a man that is enacted only by a minority of men.<sup>691</sup> Hegemonic masculinity maintains and reinforces the link between men and power as it provides a pattern of practice for the continuing subordination of women and marginalises other versions of masculinity. Therefore hegemonic masculinity is relational. It may incorporate elements of marginalised masculinities if they are of use, and requires all other men to position themselves in relation to it. Recognising a plurality and hierarchy of masculinities, those men who benefit from patriarchy without enacting its hegemonic version show a complicit

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<sup>690</sup> Connell, *Gender and Power* (n 689) 184; RW Connell, 'The Social Organization of Masculinity' in Frank J Barrett and Stephen M Whitehead (eds), *The Masculinities Reader* (Polity Press 2001) 39; Connell and Messerschmidt (n 689) 832: Hegemony in this context means dominance achieved through culture, institutions and persuasion. It is a successful claim to authority. Although hegemony here does not mean violence, it could be underpinned or supported by force. According to Connell (n 787) it is "[i]ndeed [...] common for the two to go together. Physical [...] violence backs up a dominant cultural pattern [...], or ideologies justify the holders of power [...]. The connection between hegemonic masculinity and patriarchal violence is close, though not simple."

<sup>691</sup> Connell, *Gender and Power* (n 689) 183-184; Connell and Messerschmidt (n 689) 832.

masculinity. They sustain, honour, desire and support the hegemonic version of masculinity.<sup>692</sup>

#### 5.5.2.2 *Hegemonic masculinity in practice: Northern Uganda*

Any analysis of hegemonic masculinity in practice must take into account the plurality of masculinities in any country. Versions of masculinity are “socially constructed, fluid over time and in different settings, and plural”.<sup>693</sup> Since there are as many exceptions as there are assumptions about proper gender roles in Uganda as anywhere else in the world, it is difficult to present a unified and generalised picture of the normative version of masculinity in Northern Uganda. In any case, it is necessary to distinguish between men’s lived experiences and expectations of masculinity. Taking marriage and fatherhood as an example, “not all men wish to or are able to enter into it (lived experiences), but they are all expected to become married at some point (lived expectations).”<sup>694</sup> Breaking out of these expectations is not considered an option. In Uganda’s patrilocal, patrilineal society, a man pays a bride price for the woman he wishes to marry. After marriage, the wife is considered subordinate to, and property of, her husband. Seen as unfit for formal education, women are regarded as there to help, to perform domestic work and to produce children. They are seen as exploitable bodies and tools, and their voices are often ignored. Violence against women is an internalised norm. For some men, it is a means to get a woman to love him. In a relationship, violence against women is considered a sign that the man emotionally invests into the connection. On a different note, violence against women is also viewed as a socially sanctioned extension of male authority; a way to achieve and maintain power and authority over women. As a means of discipline, it is socially acceptable to beat a woman if she does not show respect to men or because of actual or

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<sup>692</sup> Connell, *Gender and Power* (n 689) 183-184; Connell and Messerschmidt (n 689) 832, 347; Demetrakis Z Demetriou, ‘Connell’s Concept of Hegemonic Masculinity: A Critique’ (2001) 30 *Theory and Society* 337, 342; Jane L Parpart and Marysia Zalewski, ‘Introduction’ in Jane L Parpart and Marysia Zalewski (eds), *Rethinking the Man Question: Sex, Gender and Violence in International Relations* (Zed Books 2008) 11.

<sup>693</sup> Gary Barker and Christine Ricardo, ‘Young Men and the Construction of Masculinity in Sub-Saharan Africa: Implications for HIV/AIDS, Conflict, and Violence’ (2005) The World Bank, Social Development Papers, Conflict Prevention and Reconstruction, Paper Number 26 v <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/06/23/000012009\\_20050623134235/Rendered/PDF/327120rev0PAPER0AFR0young0men0WP26.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/06/23/000012009_20050623134235/Rendered/PDF/327120rev0PAPER0AFR0young0men0WP26.pdf)> accessed 16 October 2014.

<sup>694</sup> Chris Dolan, ‘Collapsing Masculinities and Weak States: A Case Study of Northern Uganda’ in Frances Cleaver (ed), *Masculinity Matters: Men, Masculinities and Gender Relations in Development* (Zed Books 2003) 4.

suspected infidelity, allegedly evidenced, for example, by the refusal to engage in sexual activities with their partner.<sup>695</sup> This indicates that men hold a power position in regard to their and their partner's sexuality. Sexualised violence and coercion as well as more general aggressiveness in regard to sexuality are common. Being sexually active demonstrates masculine prowess, competence and achievement rather than intimacy. It is a way for men to gain respect and social status.<sup>696</sup>

Men, in contrast to women, take priority. They are more educated, richer and own other assets in addition to their wives.<sup>697</sup> "To be recognised as an 'adult' and a 'man' [, however,] men are expected to become husbands and fathers [...] and to exercise considerable control over wife and children."<sup>698</sup> Financial independence and subsequently marriage and fatherhood are preconditions to be socially and politically accepted; they are preconditions to be taken seriously and to be listened to, to be perceived as responsible and able to participate in political life. Adult men have access to important resources like information, contacts and solidarity.<sup>699</sup> Unmarried young men, in contrast, are viewed with suspicion and seen as idle troublemakers, as "irresponsible, disrespectful, impatient, extravagant, arrogant, fun lovers who are ineffective at work."<sup>700</sup> To increase their status as adult men, some men have multiple wives and many children. They use their wealth in people for material and political advancement. In addition to marriage and fatherhood, being able to provide for the material needs of wife and children as well as to physically protect a family are two more key markers of Northern Ugandan hegemonic masculinity. This indicates that the achievement of manhood and masculinity is judged by other men and women rather than by the individual man himself.<sup>701</sup>

However, the context of ongoing conflict, heavy militarisation and internal displacement make it very difficult or even impossible for the majority of men to fulfil these expectations and to become a husband and father, and then the provider and protector of their family. In the absence of cattle or cash as the basis for bride-wealth payments, many men cannot get married and therefore not fulfil their roles as husbands and fathers.

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<sup>695</sup> Barker and Ricardo (n 693) v, 20-24; Dolan (n 694) 4.

<sup>696</sup> Barker and Ricardo (n 693) 16-19; Dolan (n 694) 4.

<sup>697</sup> Dolan (n 694) 4-5.

<sup>698</sup> Dolan (n 694) 5.

<sup>699</sup> Barker and Ricardo (n 693) 6; Dolan (n 694) 5.

<sup>700</sup> Dolan (n 694) 5.

<sup>701</sup> Barker and Ricardo (n 693) 4, 6-7; Dolan (n 694) 4, 16-17.



Continuing rebel and military activities compromise men's roles as protectors. Consequently, men experience an inability to take up, or sustain, roles and positions defined as the masculine norm. This leads to a crisis of identity and/or social presentation. Their fear of being seen as less than a man leads to and/or strengthens feelings of humiliation, intimidation, resentment, oppression, frustration and anger that are expressed in violent acts justified in terms of self-preservation and revenge. Men actively join the war to achieve what they feel they have been denied and to avail themselves of economic opportunities the conflict offers.<sup>702</sup> The use of violence is seen as a "potential means to achieve an end, namely masculinity, rather than an integral component of that masculinity."<sup>703</sup>

#### *5.5.2.3 Towards a new explanation of forced marriage based on hegemonic masculinity theory*

Explaining the causes and meanings of forced marriage on the basis of hegemonic masculinity theory is a novel approach that contributes to a more comprehensive understanding of the crime by adding to existing explanations. Applying the theory of hegemonic masculinity to Uganda also highlights that forced marriages are not perpetrated in times of armed conflict simply because men have the power to do it. Forced marriages are perpetrated in times of armed conflict because men cannot otherwise fulfil a certain masculine ideal which would leave them socially disadvantaged.

As outlined above, the precarious economic situation in Uganda makes it difficult for men to become financially independent. Therefore, their chances to pay bride-wealth to get married and consequently to start a family are diminished. This thwarts their pursuit of hegemonic masculinity. Men's economic responsibilities and diminished chances to fulfil these motivate them to join the war.<sup>704</sup> However, even though becoming a fighter could put men into an economic position to get married and to start a family and therefore to meet key elements of Northern Ugandan hegemonic masculinity, forced marriage in times of

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<sup>702</sup> Barker and Ricardo (n 693) v-9; Dolan (n 694).

<sup>703</sup> Dolan (n 694) 16-17.

<sup>704</sup> Barker and Ricardo (n 693); Dolan (n 694).

armed conflict offers them the same opportunity without having to pay a bride price. Fighters abduct women, take them to their camp (patrilocal) and label them their wives. Subsequently, the women are subjected to rape and forced pregnancy.<sup>705</sup> They reproduce their traditional feminine roles as wives and mothers, enabling their forced husband to fulfil his role as husband and father. Patrilineal norms are reproduced if a couple splits up after the conflict. If the woman returns to her community, she is often not allowed to keep her children as they are understood to belong to their father's clan.<sup>706</sup> In addition to playing on culturally accepted peacetime gender norms, this indicates the subordination of forced wives by their forced husbands. In a highly patriarchal, misogynist environment, forced wives are seen as exploitable bodies and tools. In addition to rape and forced pregnancy, they are subjected to enslavement, torture, forced labour, and forced participation in direct combat.<sup>707</sup> Forced husbands exercise control over their sexuality, movements and work.<sup>708</sup> This is supported by the internalised norm that violence against women is an extension of men's authority and power over women. Members of fighting groups also use violence against women as a means of discipline for disobedience, resistance, not conceiving, talking together unsupervised, having blank expressions on their faces, looking miserable, allegedly planning an escape, or breaking rules or taboos of the fighting group. The means of punishment range from severe beating to rape, torture or death.<sup>709</sup> Women are also punished for actual or suspected infidelity, based on the expectation that forced wives should have an exclusive relationship only with their forced husband. Forced husbands, in contrast, often have more than one wife. This again is supported by cultural norms. A fighter's status in the group depends on his wealth in people (wives and dependants).<sup>710</sup> He supports them materially and protects them from acts of violence perpetrated by other men.<sup>711</sup> Therefore, forced husbands fulfil their role as providers and protectors. As a result,

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<sup>705</sup> Carlson and Mazurana (n 6); Coulter (n 52).

<sup>706</sup> Carlson and Mazurana (n 6) 29; Coulter (n 52) 232.

<sup>707</sup> Carlson and Mazurana (n 6) 7; Coulter (n 52).

<sup>708</sup> Valerie Oosterveld and Andrea Marlowe, 'Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu. Case No. SCSL-04-16-T. At <<http://www.sc-sl.org/AFRC.html>>. Special Court for Sierra Leone, Trial Chamber II, June 20, 2007 and Prosecutor v Moinina Fofana & Allieu Kondewa. Case No. SCSL-04-14-T. At <<http://www.sc-sl.org/CDF.html>>. Special Court for Sierra Leone, Trial Chamber I, August 2, 2007' (2007) 101 *American Journal of International Law* 848.

<sup>709</sup> Allen and Schomerus (n 488) vi; Annan and others (n 571) 883; Carlson and Mazurana (n 6) 17-28; Kramer (n 489) 24-25.

<sup>710</sup> *AFRC Appeals Chamber Judgment* (n 23) para 195; Barker and Ricardo (n 693); Carlson and Mazurana (n 6) 28; Dolan (n 694); Kramer (n 489).

<sup>711</sup> Carlson and Mazurana (n 6) 24; Kramer (n 489) 29-30.

he keeps his forced wives in a situation of dependency upon him, coercing them into staying with him.<sup>712</sup> While forced husbands can rid themselves of forced wives by abandoning or killing them, forced wives have to escape the fighting group if they want to leave their forced husband. Escape, however, is almost impossible.<sup>713</sup> It becomes clear that forced marriage provides fighters with access to different internal and external resources like a 'proper' household, support, wealth in people, status and respect as well as solidarity and social participation in terms of bonding with other members of the fighting group. The reverse example of the exclusion and punishment of fighters who do not conform and engage in forced marriages<sup>714</sup> suggests that forced husbands gain the acceptance of the group for choosing forced marriage as a way of achieving hegemonic masculinity.

To be accepted into the fighting group, men who actually reject forced marriage are forced or coerced into complicit masculinity. They have to honour, desire, support and sustain forced marriage. In addition to complicit men, forced wives themselves support and sustain the perpetration of forced marriage. Older wives turn on younger women who are considered a shame to the household in which they live. For this reason, older wives influence their forced husbands to marry younger women.<sup>715</sup>

Unmarried young men and lower level fighters who are given fewer wives than higher ranks and commanders constitute the group of marginalised men in fighting groups.<sup>716</sup> This indicates that hegemonic masculinity in fighting groups in Northern Uganda is established through differentiation from marginalised men rather than through incorporation of certain elements of their version of masculinity. Like men who meet the norms of hegemonic masculinity, marginalised men benefit from the domestic and support work forced wives perform. Forced wives also provide the advantage of additional combatants. The fighting group as a whole benefits from the bonds and dependency structures forced wives create.<sup>717</sup>

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<sup>712</sup> Carlson and Mazurana (n 6) 24; Kramer (n 489) 29-30.

<sup>713</sup> *RUF Trial Judgment* (n 24) para 1293.

<sup>714</sup> Carlson and Mazurana (n 6) 5; Kramer (n 489) 24.

<sup>715</sup> Erin Baines and Beth Stewart, "I cannot accept what I have not done": Storytelling, Gender and Transitional Justice' (2001) 3 *Journal of Human Rights Practice* 245, 251-252: Paradoxically, however, older wives who influence their forced husbands to marry younger women know that they would have to compete against the new wife for their husband's favour which is crucial for survival.

<sup>716</sup> Kramer (n 489) 25.

<sup>717</sup> Carlson and Mazurana (n 6) 14, 21-23; Coulter (n 52) 79-80, 102-103, 112-117; Kramer (n 570) 25, 29-30.

The existence of marginalised but complicit masculinities constitutes a continuous test for, and increases the need to, demonstrate one's masculinity. This creates an environment of vulnerability and potential failure, resulting in constant competition between the fighters. Increased by the atmosphere of violent conflict, this environment of humiliation, intimidation, frustration and anger as well as personal uncertainty, insecurity and fear of failure creates a desire to be in control. Associated with sexuality, the fear to lose control is implied by intimacy in the sense that physical intimacy involves giving up control and letting go. For a person who is afraid to lose control, this can be an uneasy situation. Against this background, in addition to a strategy of bonding, forced marriage, which includes a very violent form of sexuality, can be interpreted as a means to disguise feelings of inadequacy and weakness, and as a means for empowerment. (Sexual) aggressiveness can also be seen as a way to negotiate the latent tensions and aggressiveness between the fighters. If these tensions are based on the aforementioned competition between male fighters, killing another man's forced wives can be understood as a way to subordinate him. Violence in war, as in peace, becomes a means of self-preservation as a man as well as of revenge for not being able to achieve manhood and masculinity otherwise.<sup>718</sup>

#### 5.5.2.4 Hegemonic masculinity and existing explanations of forced marriage

In addition to providing a new explanation of the causes and meanings of forced marriage in times of armed conflict, analysing the crime based on the theory of hegemonic masculinity also highlights inconsistencies of some of the existing explanations outlined above. When thinking about forced marriage through a hegemonic masculinity lens, the substitution argument that forced marriages were engaged in to reduce the number of war rapes of civilians appears to be based on the false assumption that both crimes would serve the same purpose. While forced marriage provides fighters with the opportunity to become

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<sup>718</sup> Frank J Barrett, 'The Organizational Construction of Hegemonic Masculinity: The Case of the US Navy' in Frank J Barrett and Stephen M Whitehead (eds), *The Masculinities Reader* (Polity Press 2001) 96-97; Frank J Barrett and Stephen M Whitehead (eds), *The Masculinities Reader* (Polity Press 2001) 73-76, 219-222; Deborah Kerfoot, 'The Organization of Intimacy: Managerialism, Masculinity and the Masculine Subject' in Frank J Barrett and Stephen M Whitehead (eds), *The Masculinities Reader* (Polity Press 2001) 237; Michael A Messner, 'Friendship, Intimacy, and Sexuality' in Frank J Barrett and Stephen M Whitehead (eds), *The Masculinities Reader* (Polity Press 2001) 259; Sandra Whitworth, 'Militarized Masculinity and Post-Traumatic Stress Disorder' in Jane L Parpart and Marysia Zalewski (eds), *Rethinking the Man Question: Sex, Gender and Violence in International Relations* (Zed Books 2008) 121.

husbands, fathers, and providers for, and protectors of, a family, war rapes do not. War rapes confirm a different kind of hegemonic masculinity which includes, for example, sexual prowess. While forced marriages provide fighting groups with additional and necessary manpower, war rapes do not. In most cases, women who were raped by male fighters do not become part of a fighting group to support its operation.

The understanding of forced wives as status symbols especially for fighting group leaders like Joseph Kony is another explanation that can be developed further on the basis of an understanding of forced marriage informed by the theory of hegemonic masculinity. The interpretation advanced above that Kony's personal benefit could not explain the perpetration of forced marriages throughout the LRA is only partly correct. The perpetration of forced marriages does not only benefit a fighter personally as in achieving hegemonic masculinity. It also confirms the fighter's man- and adulthood and makes him a full member of society. Therefore, for the benefit of the whole fighting group, its effectiveness and efficiency, Kony has to give women to his fighters to make them men.

Seeing forced marriage through a hegemonic masculinity lens also offers an opportunity to adapt the argument that forced marriages in times of armed conflict are based on socio-culturally accepted peacetime marriage practices that are simply pushed into wartime. The analysis of hegemonic masculinity in Uganda and the parallels that can be drawn to forced marriages in times of armed conflict indicate that it is not a socio-culturally accepted peacetime marriage practice that is pushed into wartime, but rather socio-culturally accepted peacetime gender norms. Men strive to be financially independent, husbands, fathers, providers and protectors, and in the context of Uganda's precarious economic situation and the conflict, they see forced marriage as a way to fulfil this socially accepted ideal. However, while forced marriage in times of armed conflict may be based on socio-culturally accepted masculine ideals and men may use it as an opportunity to fulfil these, forced marriage violates women's gender norms. While marriage and motherhood are expected of women and achieved through forced marriage, forced wives transgress women's gender roles by participating in combat. This resonates with their stigmatisation as collaborators, rebels and killers.

#### 5.5.2.5 *Limitations of hegemonic masculinity theory*

Even though the theory of hegemonic masculinity holds great explanatory power in regard to forced marriage in times of armed conflict, its shortcomings have to be mentioned too. Since the theory is based on essentialist concepts of gender, it negates the prospect of ascribing women with masculine characteristics. It negates the prospect of women forcing men into forced marriage.<sup>719</sup> If we applied the Ugandan ideal of masculinity to women, we would, for example, be able to interpret forced wives' improved access to food and looted goods through engaging in combat roles as a means to gain economic, and consequently more general, independence from their forced husbands and the fighting group.

A focus on hegemonic masculinity also easily overlooks how men who meet the ideal of masculinity simultaneously can be seen as deviating from it. Taking the example of fighters, they meet the masculine requirement of physical strength, toughness, activeness and capacity for violence. However, at the same time they are required to be obedient, to submit to authority and to endure humiliation, which are generally seen as feminine traits.<sup>720</sup>

Since hegemonic masculinity theory assumes that all men aspire to conform to a certain ideal of masculinity or benefit from it, it cannot explain why some male fighters never marry.<sup>721</sup>

#### 5.6 *Conclusion*

Taking together the elaborations on war rape in Chapters 4 and 5, for the purpose of this thesis, war rape is understood as “a physical invasion of a sexual nature”,<sup>722</sup> a sexual expression of violence and aggression. It is an act of force that exploits power inequalities. Power inequalities include gender inequality, inequalities between men, inequalities between women, inequalities of socio-economic resources, and inequalities based on

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<sup>719</sup> Lawry (n 570).

Forced same-sex marriages also fall outside the explanatory powers of hegemonic masculinity.

<sup>720</sup> Charlotte Hooper, *Manly States: Masculinities, International Relations, and Gender Politics* (Columbia University Press 2001) 47.

<sup>721</sup> Baines (n 676) 411.

<sup>722</sup> *Akayesu* Trial Judgment (n 12) para 598.

nationality, race, culture, class, age, education, profession and sexual orientation. Consequently, war rapes are committed under (possibly especially created) coercive circumstances expressed through, for example, threats or deceit, rendering the victim incapable of giving genuine consent. However, it has to be stressed that not all sexual interactions in times of armed conflict are rapes. Moreover, women's agency has to be emphasised. Therefore, an element of lack of consent remains important in defining war rape. However, consent has to be interpreted as genuine agreement. Silence or the lack of resistance does not necessarily amount to consent. Moreover, an element of absence of consent has to be included in a definition of rape in a way that it can be established by proving coercive circumstances without having to introduce evidence of the survivor's lack of consent. Downsides of a (partly) consent-based definition such as a focus on the behaviour of the survivor have to be considered. War rapes are an extreme continuation of structural peacetime violence. They target a person's dignity, autonomy, self-determination, bodily integrity and identity. War rapes cause physical, psychological and social harm. They humiliate, shame, stigmatise, intimidate, degrade, punish, control and destroy the individual survivor as well as their families, communities and society as a whole. War rape is a crime in and of itself and it can also constitute, for example, an act of genocide, ethnic cleansing and torture.

Forced marriage in times of armed conflict means that, in the coercive context of armed conflict, the status of marriage is conferred on someone by words or deeds.<sup>723</sup> Forced marriage includes acts of physical and psychological violence such as abduction, manipulation, enslavement, deprivation of liberty, sexualised violence, forced pregnancy, forced labour, corporal punishment and forced recruitment. Nevertheless, some see it as a way to survive; to protect themselves from what they consider worse acts of violence and to gain economic benefits. Forced marriages are formed in times of armed conflict to exercise control over someone, targeting a person's self-determination. Forced wives also are a reward and status symbol. Forced marriages create dependency structures in fighting groups and destroy traditional interpersonal bonds because forced wives are stigmatised by, and excluded from, their families and communities. Forced marriage is a way to fulfil a certain masculine ideal that cannot be achieved otherwise. This indicates that forced marriage is a form of structural gender-based violence that is a continuation from

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<sup>723</sup> Prosecution Final Brief para 1009-1012 as cited in *AFRC* Trial Judgment (n 23) para 701.

peacetime norms and practices. Legally, forced marriage has been categorised as form of sexual slavery, which highlights the seriousness of the crime. However, it overemphasises the sexual elements of forced marriages. An inhumane act of forced marriage instead reflects the conduct's distinctive and multifaceted nature, although it arguably conceals the seriousness of the crime. In addition to these different categorisations, different terms for the conduct have been developed: forced marriage and conjugal slavery. The SCSL argued that since no actual marriage takes place between the spouses, 'forced marriage' is a misnomer for what would better be called 'conjugal slavery'. As mentioned above, even though the label 'slavery' highlights the seriousness of the conduct, it creates a fragmentation of the elements of forced marriage into different forms of slavery. Moreover, (ex-)forced wives are unlikely to self-identify with that label. The term 'forced marriage' has the advantage that it recognises an "interrelated, whole conduct".<sup>724</sup> Naming forced marriage "provid[es] a single name for the larger overarching harm associated with a particular collection of offences and therefore capturing, in one definition, harm that other international criminal law terms do not adequately or fully capture."<sup>725</sup> Therefore, the term 'forced marriage' is used throughout the thesis.

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<sup>724</sup> Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55) 142.

<sup>725</sup> Oosterveld, 'Forced Marriage and the Special Court for Sierra Leone' (n 55) 144.



## **6 The ICC negotiations in general: Actors' identities, influences and methods**

### *6.1 Introduction*

Chapters 4 and 5 provided the broader thematic context for the assessment of the ICC definitions of war rape and forced marriage in times of armed conflict, and the analysis of how these definitions came about. Building on this, Chapters 6 – 9 analyse how the ICC definitions of war rape and forced marriage came about, and address the research questions and hypotheses stated in Chapter 1.

Chapter 6 focuses on the identity of actors involved in the ICC negotiations in general (Research Question 1). Following feminist and constructivist theories, it is important to critically examine not only contexts, agendas and assumptions but also actors and their identities that shape their interests and actions. As explained in Chapter 2, actors' identities, in turn, are shaped by normative structures. For the purpose of this thesis, normative structures are personal, national and international values, norms and rules. Since actors and structures mutually influence each other (constructivist circle), they have to be analysed together.

In the context of treaty negotiations, individuals are mainly viewed as representatives of different constituencies. They are rarely seen as individuals who can have an impact on negotiation dynamics, courses and outcomes. The second part of the chapter portrays state delegates at the ICC negotiations as individual experts who have to follow their governments' instructions. However, their instructions leave space for personal and international values, norms and rules to come into play. Therefore, in this context, an emphasis is placed on normative structures shaping actors. However, the examples given also show that actors shape normative structures, for example by influencing the content and interpretation of their instructions, which impacts on the making of international rules. In addition to these two inter-connected lenses, the third part of this chapter outlines the formation of state coalitions based on shared national norms. This way, the (power) dynamics of the ICC negotiations are highlighted. The fourth part of Chapter 6 moves away from a state-centric view on the ICC negotiations and analyses NGOs as a group that also played a crucial role. A focus is placed on the CICC, its founding, composition, motivation, general interests, sources of funding, ways of participation in, and influencing, the ICC negotiations, and its relationship with state delegations. The Women's Caucus is singled out as a specific group within the NGO Coalition. The Caucus is of great relevance for this thesis as it was the main actor driving

the negotiations of sexualised crimes. Especially the last two sections of this chapter explore the methods the CICC and the Women's Caucus used to influence states' positions (Research Question 4).

## 6.2 State delegates as individuals

As may be expected, government delegations at the ICC negotiations were constituted mainly of career diplomats and senior civil servants, to a lesser extend of public and private experts including legal specialists mainly of International Law and domestic criminal law, and a few politicians. Delegates were not subject specialists.<sup>726</sup> To a certain extent, they negotiated in a vacuum.<sup>727</sup> Many "lacked experience in [...] [International Criminal Law], comparative criminal law, or comparative criminal procedure. Most delegates had no criminal practice experience of any kind."<sup>728</sup> They also seldom had experience of war and military conduct.<sup>729</sup>

Delegates had to secure their national interests as laid out in instructions they received from their governments. These instructions included negotiation objectives; information on what a state aimed for, what it was prepared to accept and what it could not compromise on.<sup>730</sup> The representative of the United Kingdom of Great Britain and Northern Ireland (UK), Elizabeth Wilmschurst, stands as an example. Before a change of government in 1997, the UK was sceptical about the establishment of an international criminal court. When the Labour Party took over from the Conservatives, however, the UK's position changed. Wilmschurst represented the country before and after the 1997 elections and argued for the position of each respective government.<sup>731</sup>

At first glance, the relevance of governmental instructions seems to put personal and international values and norms in the backseat. When considering, however, that

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<sup>726</sup> Interview 3 (25 March 2014); Interview 18 (n 5); Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 91.

<sup>727</sup> Interview 3 (n 726); Benedetti and Washburn (n 34) 16.

<sup>728</sup> Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 91.

<sup>729</sup> Interview 3 (n 726).

<sup>730</sup> Interview 1 (21 March 2014); Interview 3 (n 726); Interview 17 (n 5); See also Benedetti, Bonneau and Washburn (n 28) 65.

<sup>731</sup> Interview 15 (27 May 2014).

instructions from national governments were “mostly not very specific”,<sup>732</sup> contradictory and/or inadequate,<sup>733</sup> it becomes clear that they did leave room for both, personal and international normative structures to come into play. In these situations, delegates had to take into account their own professional experience as negotiators, regular progress evaluations and their perception of the overall interest of the international community. Delegates can and often did have an impact on the content of their instructions through reports to, and influence on, their ministries.<sup>734</sup> Moreover, committed, creative and enthusiastic delegates would approach others to show them that certain proposals or positions, including those on gender and sexualised violence, were not contrary to the instructions they received from their governments.<sup>735</sup> This way, individual delegates influenced international normative structures. Here, personal contacts were of vital importance.<sup>736</sup> The example of a speech made by a member of the Colombian delegation in relation to the crime of forced pregnancy in which he voiced an opinion contrary to the previously negotiated compromise definition, however, was rebuked. This demonstrates that international norms in the wake of becoming rules trumped personal values.<sup>737</sup> The example of the Canadian delegation further indicates that international, national and personal values and norms mattered in the ICC negotiations. At the time the ICC negotiations took place, the Canadian Minister of Foreign Affairs championed the Human Security Agenda. This included the view that human security could not exist as long as gender inequality persists and violence against women is perpetrated. This motivated the minister and his delegation to work towards ensuring that an international criminal court would learn from past mistakes of the Nuremberg and Tokyo tribunals as well as the ICTY and ICTR in not paying enough attention to gender crimes and their appropriate

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<sup>732</sup> Interview 1 (n 730); See also Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 87; Benedetti, Bonneau and Washburn (n 28) 65; Lindblom (n 34) 474-475.

<sup>733</sup> Interview 11 (23 April 2014); Interview 18 (n 5); Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 87; Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 706-707.

<sup>734</sup> Interview 11 (n 733); Interview 18 (n 5); Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 87; Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 706-707.

<sup>735</sup> Interview 5 (01 April 2014); Interview 6 (02 April 2014); Interview 9 (n 430); Interview 13 (n 2); Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 87; See also Lindblom (n 34) 474-475.

<sup>736</sup> Interview 1 (n 730); Interview 4 (26 March 2014); Interview 5 (n 735).

<sup>737</sup> Interview 2 (n 467).

investigation.<sup>738</sup> These points of view were supported by Australia and New Zealand.<sup>739</sup> For New Zealand, this was in line with its support for gender equality and non-discrimination at UN level.<sup>740</sup> A similar interplay between international, national and personal values, norms and rules can be seen from the example of the Bosnian delegation. Influenced by his country's experience of the war in the 1990s, the Bosnian ambassador was keen to have sexualised violence included in the list of war crimes and had "the moral authority to do so".<sup>741</sup> Therefore he actively supported instructions received from the Bosnian government to make sure that the instruments and jurisprudence<sup>742</sup> of the *ad hoc* tribunals would be considered in drafting the ICC instruments.<sup>743</sup>

### 6.3 State delegations as groups

As the paragraphs above indicated, the ICC negotiations can be characterised as political rather than technical,<sup>744</sup> "an exercise in international relations" that constructed its own reality.<sup>745</sup> Coalitions formed by state delegations contributed to the creation of this distinct reality. Initially, state coalitions formed along geographic lines. Increasingly, however, they were based on states' positions on an international criminal court.<sup>746</sup> Therefore, some of these coalitions transcended traditional divides. However, they did not completely remove boundaries as traditional power dynamics remained in place at least partly. The support for the Rome Statute of the permanent members of the UNSC, for example, was still seen as crucial.<sup>747</sup>

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<sup>738</sup> Interview 17 (n 5); Interview 18 (n 5); Interview 19 (n 483).

<sup>739</sup> Interview 19 (n 483): Canada, Australia and New Zealand consulted with each other on most UN issues.

<sup>740</sup> *ibid.*

<sup>741</sup> Interview 18 (n 5).

<sup>742</sup> Interview 2 (n 467): The ICTY and *Prosecutor v Anto Furundžija* were mentioned explicitly here.

<sup>743</sup> *ibid.*

Interview 12 (15 May 2014); Interview 19 (n 483): Even though Bosnia was interested in, and vocal in regard to, all gender crimes, it was not as deeply involved in their negotiation as for example the Arab block, Colombia and the US. While it was following the developments closely, it was not actively involved in drafting work.

<sup>744</sup> Interview 2 (n 467); Interview 3 (n 726); Interview 7 (n 467); Interview 8 (11 April 2014); Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 91.

<sup>745</sup> Interview 2 (n 467); Interview 3 (n 726).

<sup>746</sup> Benedetti and Washburn (n 34).

<sup>747</sup> Interview 3 (n 726); Interview 16 (10 June 2014).

The coalition approach facilitated equality between the global North and South. However, a low level of awareness of civil society, parliamentarians and government leaders regarding the ICC negotiations until August 1998,<sup>748</sup> as well as a lack of funding,<sup>749</sup> resulted in a low level of participation of state and NGO delegations from the global South in the first PrepCom sessions. For example, the initial absence or low level of involvement of Arab states in the ICC negotiations was put down to practical rather than normative reasons. It was argued that they lacked training in legal reform processes and therefore did not fully participate. However, their behaviour and the attitude that others will take care of everything were also brought forward as possible explanations.<sup>750</sup> Also invoking national and regional norms, it was said that Arab states did not engage because of the perceived inherent unfairness of the court as a Western institution, and concerns that it would interfere in domestic matters.<sup>751</sup> Practical and strategic reasons were also brought forward in trying to explain the initial low level of engagement of other states in the ICC negotiations. It was argued that “third world countries did not take [the process of establishing the ICC] seriously [...] because they thought it was too expensive [and only participated to be seen as civilised]”.<sup>752</sup> The latter explanation resonates with the motivation of other states, for which participation meant legitimisation for their national governments.<sup>753</sup> However, these arguments raise the question whether states from the global South did not see the advantages of having a permanent international criminal court independent of the UNSC and specific situations like many others did.<sup>754</sup> A low level of engagement from certain states can also be understood as resistance towards the external imposition of a legal reform process that should have been initiated by the domestic government. This imposition can be understood as a form of social engineering if main donor countries are also the main sponsors of a new international treaty that may require national implementation and therefore national law reform. Donor countries could then

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<sup>748</sup> Coalition for the International Criminal Court, ‘Regional Reports’ *ICC Monitor* (New York, August 1997) 11, 14; Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 705; Ghana, Lesotho, Malawi, South Africa, Tanzania, and Uganda were among the more active African delegations.

<sup>749</sup> Christopher Keith Hall, ‘The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court’ (1997) 91 *American Journal of International Law* 177, 186; Amando Miclat, ‘A View from the South’ *ICC Monitor* (New York, January 1997) 11.

<sup>750</sup> Interview 14 (26 May 2014).

<sup>751</sup> *ibid.*

<sup>752</sup> Interview 4 (n 736).

<sup>753</sup> Interview 2 (n 467).

<sup>754</sup> Interview 11 (n 733).

make continuing financial support for some states dependent upon them participating in negotiations and signing the treaty. And vice versa, if donor countries like the US are opposed to a new treaty, continuing support, for example for some African states, could be made dependent upon them not signing the treaty.<sup>755</sup> Making governments appear helpless, pushed about and out of control, this could give rise to low-level participation in international law-making processes or opposition to the outcomes.<sup>756</sup>

As the negotiations continued, the initial North-South divide decreased. Countering arguments that “third world countries did not take [the process of establishing the ICC] seriously”,<sup>757</sup> African delegations from all parts of the continent participated actively from the sixth PrepCom session in March/April 1998 on. They cooperated closely on many issues on the basis of principles adopted by members of the Southern African Development Community (SADC) in September 1997, and the Dakar Declaration adopted by government and NGO representatives at a conference in Senegal in February 1998.<sup>758</sup> At Rome and since, African diplomats took a lead in pushing for an international criminal court with a significant degree of independence from the UNSC and European powers. Due to the size of the group – fifty-three African states were involved in the negotiations – they were able to steer the debate forcefully.<sup>759</sup> “Since many of the countries involved [had] only recently ended colonial rule [...] or set up ‘truth commissions’ [...], many also [had] the moral authority to push for the Court to be an effective one.”<sup>760</sup> The assignment of this authority can be seen as another example of national and international normative structures shaping actors’ identities. National experiences of colonialism and conflict highlight that norms and rules related to independence, self-determination, peace and justice were held high at national level. These national normative structures coincided with international ones. African actors were seen as allies in the struggle to end impunity for acts of genocide, war crimes and crimes against humanity. This shapes the identities of these actors in the international fora of the ICC negotiations. The example above also

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<sup>755</sup> Interview 3 (n 726); Interview 4 (n 736); Interview 14 (n 750).

<sup>756</sup> Interview 3 (n 726).

<sup>757</sup> Interview 4 (n 736).

<sup>758</sup> Benedetti, Bonneau and Washburn (n 28) 82-83; Christopher Keith Hall, ‘The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court’ (1998) 92 *American Journal of International Law* 548, 555; Human Rights Watch, ‘World Report 1999: Special Issues and Campaigns: The ICC’ <<http://www.hrw.org/legacy/worldreport99/special/icc.html>> accessed 23 January 2014

<sup>759</sup> — — ‘Africa Speaks Strongly for Court’ *Terra Viva* (Rome, 16 June 1998) 4; Richard Dicker, ‘S. African Governments Adopt Common Approach to ICC Ratification’ *ICC Monitor* (New York, August 1999) 3.

<sup>760</sup> — — ‘Africa Speaks Strongly for Court’ (n 759); See also Benedetti, Bonneau and Washburn (n 28) 3.

indicates that experiences of war and Human Rights abuses motivated African state delegations to participate in the ICC negotiations.<sup>761</sup>

Contributing to this heightened level of participation of actors from all over the world in the ICC negotiations, the CICC used the funding it received from various foundations, individuals, states and other institutions, including the European Union and some of its member states, the Ford Foundation and the MacArthur Foundation, to support NGOs and state delegations from developing countries.<sup>762</sup> It assisted state delegations by providing representatives, legal experts and interns to serve (on) smaller delegations.<sup>763</sup> The delegations of Bosnia and Herzegovina, Burundi, Comoros, Congo, Samoa, Senegal, Sierra Leone, and Trinidad and Tobago are examples of state delegations that included NGO representatives.<sup>764</sup> On the one hand, this enabled state delegations as well as members of civil society to participate more actively and directly in the ICC negotiations. With more people on a state delegation, more meetings could be covered. Being present in a meeting meant knowing what was discussed and being able to participate in ongoing (informal) work. For the state delegation, this cooperation helped to develop its legal arguments.<sup>765</sup> For members of the civil society, serving on a state delegation meant access to, and speaking rights in, all meetings. This way, a civil society member of a state delegation was, for example, able to influence the provision covering forced pregnancy.<sup>766</sup> It enabled members of the civil society to continue to argue their original points in a

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<sup>761</sup> Marlies Glasius, 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court' in Helmut K Anheier, Marlies Glasius and Mary Kaldor (eds), *Global civil society 2005/6* (Oxford University Press 2002) 145.

<sup>762</sup> Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 76; Coalition for the International Criminal Court, 'Who We Are & What We Do: Global Partners' <<http://www.iccnw.org/?mod=supporters>> accessed 05 December 2013; Pace and Schense, 'Coalition for the International Criminal Court at the Preparatory Commission' (n 34) 708.

<sup>763</sup> Lindblom (n 34) 476-477; Pearson (n 34) 260, 267.

<sup>764</sup> Interview 15 (n 731); Benedetti, Bonneau and Washburn (n 28) 80; Glasius, 'Expertise in the Cause of Justice' (n 761) 151; The Stanley Foundation, 'The New Court: Civil Society's Victory' *Common Ground Radio* (06 October 1998) <<http://www.commongroundradio.org/shows/98/9840.html>> accessed 16 February 2015; Johan D van der Vyver, 'Civil Society and the International Criminal Court' (2003) 2 *Journal of Human Rights* 425: In addition, the delegations of Canada and Costa Rica included NGO representatives as a gesture of goodwill. Other states engaged the services of domestic (Germany, the Netherlands, the US) or foreign (Samoa, the Solomon Islands) professors of law as delegation members. Academics who served as official delegates included M Cherif Bassiouni, Professor of Law at De Paul University (Egypt and chair of the Drafting Committee in Rome), Theo van Boven, Professor of International Law at Maastricht University (Netherlands), Aziz Chukri, Professor of International Law at the University of Damascus (Syria), Professor Roger Clark of Rutgers University in Camden, New Jersey (Samoa), Professor Gerhard Hafner, Director of the Institute for International Law and International Relations of the University of Vienna (Austria), and Medard Rwelamira, Professor of Law at the University of the Western Cape (South Africa).

<sup>765</sup> Glasius, 'Expertise in the Cause of Justice' (n 761) 151.

<sup>766</sup> Interview 4 (n 736).

different forum. They stayed true to their own and their organisations' views and still argued for, and on the basis of, the same views when they became members of state delegations.<sup>767</sup> In these situations, national norms had a low impact. In addition to providing civil society members to support small state delegations, some state delegations like Canada also included two civil society members not only to benefit from their expertise amongst others on gender issues, but also to have NGO's points of view reflected in the delegation.<sup>768</sup> On the other hand however, CICC funding made NGOs and government delegations especially from the global South dependent on support from the global North.<sup>769</sup> Donors could have exploited this power imbalance to push state or NGO delegations to take on certain issues or points in return for support, manipulating discussions and outcomes.<sup>770</sup>

Even though the previous paragraphs show that the coalition approach facilitated equality between state delegations, inequalities based on language existed and restricted opportunities for actors to influence international normative structures. Those who actively participated in the ICC negotiations were largely English-speaking.<sup>771</sup> How crucial English language skills were becomes apparent when considering that much of the information that was circulated was in English. Moreover, the decisive working group and informal meetings took place in English only without translation (and record). Those who wanted to speak or discuss a proposal had to do so in English.<sup>772</sup> This led to a situation where a delegation's advisor was sent to negotiate in these meetings because he was the only English speaker.<sup>773</sup> It also resulted in some states having an advantage regarding the submission of proposals and therefore, they became key actors in the negotiations. This indicates that states that contributed written proposals gained more visibility than those that

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<sup>767</sup> Interview 15 (n 731); Glasius, 'Expertise in the Cause of Justice' (n 761) 151; Lindblom (n 34) 477.

<sup>768</sup> Interview 3 (n 726); Interview 4 (n 736); Interview 9 (n 430); Interview 17 (n 5).

<sup>769</sup> Anne Bichsel, 'NGOs as Agents of Public Accountability and Democratization in Intergovernmental Forums' in William M Lafferty and James Meadowcroft (eds), *Democracy and the Environment: Problems and Prospects* (Edward Elgar Publishing 1996) 237; Pearson (n 34) 260, 267.

<sup>770</sup> Interview 3 (n 726).

<sup>771</sup> Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 76; Glasius, *The International Criminal Court* (n 34) 126.

<sup>772</sup> Interview 2 (n 467); Interview 3 (n 726); Interview 7 (n 467); Interview 12 (n 743); Interview 18 (n 5); Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 80; Benedetti, Bonneau and Washburn (n 28) 96; Rothschild (n 34) 100.

<sup>773</sup> Interview 2 (n 467).



participated mainly verbally. This is due to the fact that if a written proposal was submitted, it had to be dealt with seriously. It could not be ignored.<sup>774</sup> In situations where sceptics submitted a proposal that, if adopted, would have made the court acceptable to them, disregarding their proposal would have created the risk that these sceptics might have withdrawn their support for the court completely. Conversely, written proposals also could not be ignored as to do so might have risked alienating the court's allies.<sup>775</sup> Too much attention paid to sceptical proposals and the potential result of a watered down institution and instruments might have frustrated the court's allies, resulting in withdrawal of support.

The number of key actors in the ICC negotiations was further limited by the fact that consensus was needed. The more actors discussed a proposal, the more difficult it became to agree on it. Therefore, the informal or working group meetings, in which a lower number of delegations participated already, were further downsized into smaller groups or blocks who worked on a proposal together. Once they drafted a proposal, it was fed back into the larger groups, step by step.<sup>776</sup> The compromise they delivered was often "so delicate that not even a single word [could] be changed. It was nearly impossible to undo those texts."<sup>777</sup> The negotiations of the elements of genocide in the first session of the PrepCom2 stand as an example here. Disagreement about the contextual element was overcome in informal discussions between the US and Canada, supported by the UK, Germany, Australia and others. A compromise was worked out which was then put before an informal meeting chaired by Herman von Hebel, the coordinator of the working group on the elements of crimes, before it was incorporated into a rolling text.<sup>778</sup> A degree of secrecy was upheld about the block meetings, their participants and about what was discussed. Especially small states were seldom invited or able to participate. This indicates that the size of delegations mattered. Bigger delegations had an advantage because they could send members to simultaneous meetings.<sup>779</sup>

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<sup>774</sup> Interview 2 (n 467); Interview 3 (n 726); Interview 7 (n 467); Interview 12 (n 743); Interview 18 (n 5).

<sup>775</sup> Interview 2 (n 467); Interview 3 (n 726); Interview 7 (n 467); Interview 12 (n 743); Interview 18 (n 5).

<sup>776</sup> Interview 2 (n 467); Interview 3 (n 726); Interview 7 (n 467); Interview 12 (n 743); Interview 18 (n 5); Rothschild (n 34) 100.

<sup>777</sup> Interview 4 (n 736).

<sup>778</sup> Elizabeth Wilmschurst, 'ICC: PrepCom. 16 – 26 February 1999' (01 March 1999).

<sup>779</sup> Interview 2 (n 467); Interview 3 (n 726); Interview 7 (n 467); Interview 12 (n 743); Rothschild (n 34) 100.

Much of the dynamism of the ICC negotiations was driven by the Like-Minded Group (LMG)<sup>780</sup> which was formed with encouragement of the CICC in the second PrepCom session. The LMG was first chaired by Canada, then by Australia. At the beginning of the Rome Conference, its members also included Austria, Argentina, Belgium, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, the Netherlands, New Zealand, Norway, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing twelve Caribbean states), Uruguay, and Venezuela.<sup>781</sup> Based on shared goals, it developed a strong, but sometimes uneasy partnership with the CICC and other experts.<sup>782</sup> Like the CICC, the LMG advocated

“the independence of the international criminal court from the [UNSC], the independence of the prosecutor, the extension of the inherent jurisdiction of the international criminal court to cover all core crimes, the full cooperation of states with the international criminal court, a successful diplomatic conference, the prompt creation of an independent and effective court, and the power of the international criminal court to finally decide on the unavailability or unwillingness of national systems to proceed with a case.”<sup>783</sup>

Like the LMG, the NAM made up of China, India, Israel, Pakistan, a group of Arab states and others also advocated the independence of the court from the UNSC. In general, however, they favoured a much weaker institution. The members of the Arab block, for example, spoke out for war crimes provisions covering only international armed conflicts, for the exclusion of the term ‘gender’ and related provisions, for a change in the provisions covering child soldiers to exclude the Palestinian intifada, and the inclusion of the death penalty.<sup>784</sup> The NAM also focused on the prohibition of nuclear weapons. It saw nuclear weapons as the weapons of developed countries while chemical and biological weapons were those of developing states. Therefore, if the former would not be included in the list

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<sup>780</sup> Benedetti, Bonneau and Washburn (n 28) 97: The name goes back to a resolution negotiated by Australia, Canada, Germany, New Zealand, Norway and others, proposing revisions to the ILC’s draft statute for an international criminal court. “The chair [of the Sixth Committee, Ambassador George O Lampety of Ghana] proposed this ‘Like-Minded resolution’ to the Sixth Committee”.

<sup>781</sup> Interview 11 (n 733); — — ‘Alliances Cut Through North-South Divide’ *Terra Viva* (Rome, 22 June 1998) 1; Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 74; Benedetti, Bonneau and Washburn (n 28) 84.

<sup>782</sup> For more information on the relationship between the CICC and state delegations at the ICC negotiations see part 6.5.

<sup>783</sup> Benedetti and Washburn (n 34) 21.

<sup>784</sup> Benedetti and Washburn (n 34) 31; Benedetti, Bonneau and Washburn (n 28) 148, 150, 160.

of prohibited weapons under the war crimes provision, neither should the latter.<sup>785</sup> The Movement's influence on the ICC negotiations, however, was weakened due to historical enmities between the members of the group, preventing it from growing together. NAM's cohesion soon faded and the Movement broke apart. Its members either joined the LMG or reformed into regional groups like SADC.<sup>786</sup> It can be assumed that their decision which group to join was based on assessments of compatibility of a delegation's national norms and rules with those of the groups they could join.

Led by South Africa, SADC stood as a counterweight to Europe that was eventually integrated into the LMG.<sup>787</sup> Again, this change of identity could be based on an evaluation resulting in the perception that SADC's and the LMG's values and norms were compatible. Constructivist theory suggests for both situations, the inclusion of former NAM members into SADC and the LMG as well as the eventual incorporation of SADC into the LMG, that the change in SADC's and the LMG's composition had an effect on their identities and consequently their interests and actions.

Many Caribbean states also joined forces, advocating the inclusion of drug related crimes in the jurisdiction of an international criminal court and the court's power to impose the death penalty.<sup>788</sup>

In contrast to the LMG and NAM, the five permanent members of the UNSC aimed at keeping the court under UNSC control, modelling it after the *ad hoc* tribunals.<sup>789</sup> As noted above, in 1997 however, the UK changed its position after a change of government, and joined the LMG.<sup>790</sup> It worked towards the Western objective to succeed in establishing a permanent international criminal court and to have the maximum number of states involved.<sup>791</sup> Following a pragmatic approach, for the UK, as for many Western states, an international criminal court was a foreign policy issue, intended to close a gap in states' foreign policy armoury. It was envisaged as a permanent juridical process to assist peace after conflict by initiating prosecutions straight away rather than having to create a new

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<sup>785</sup> Elizabeth Wilmschurst, 'Report on the Conference for the Establishment of an International Criminal Court: 15 June – 17 July 1998' (23 September 1998); Benedetti and Washburn (n 34) 30-31; Glasius, *The International Criminal Court* (n 34) 22-26.

<sup>786</sup> Benedetti and Washburn (n 34).

<sup>787</sup> Benedetti and Washburn (n 34) 31.

<sup>788</sup> Glasius, *The International Criminal Court* (n 34) 24.

<sup>789</sup> Benedetti and Washburn (n 34) 30-31; Glasius, *The International Criminal Court* (n 34) 22-26.

<sup>790</sup> Interview 15 (n 731); Human Rights Watch, 'World Report 1998' <[http://www.hrw.org/legacy/worldreport/Intro97.htm#P1\\_0](http://www.hrw.org/legacy/worldreport/Intro97.htm#P1_0)> accessed 05 December 2013.

<sup>791</sup> Interview 3 (n 726).

institution on an *ad hoc* basis first. Invoking issues of national sovereignty, it was important that the court was not to (be seen to) damage Western governments who were worried that the institution might prosecute their own people. It can be argued that their concerns were unnecessary because the ICC needs states' support to be effective. Furthermore, Western armed forces enjoy a working military discipline where breaches thereof are dealt with appropriately within the military system.<sup>792</sup> They may have had a reason to worry, however, when considering that UN peacekeepers, including Western military personnel, have been involved in crimes like trafficking in human beings and forced prostitution.<sup>793</sup> Therefore, Western states could be pressured to launch investigations against their own people to avoid involvement of an international criminal court, which would be "poison"<sup>794</sup> for every government. As mentioned above in relation to the UK, the example of the French delegation also shows that it was a change in national power dynamics and consequently national normative structures that led to a change in France's identity in the ICC negotiations. Initially, when the establishment of a permanent international criminal court still seemed unlikely, France was very supportive of the project. When the court began to take shape, however, France took a more cautious position. France shared the UK's concerns regarding the protection of its own people. Like the UK, after a change of government in 1997, the French policy changed again and became more constructive. This was supported by the Minister of Justice, indicating once more that in addition to national norms, personal values mattered in the ICC negotiations. The French delegation did not go as far as joining the LMG however. Rather, the French were approached by the LMG, wishing to secure the ratification of the Rome Statute by some of the permanent members of the UNSC. The importance ascribed to the support of this group of states indicates that, contrary to what is argued by some, traditional power dynamics were at least partly reinforced.<sup>795</sup>

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<sup>792</sup> Interview 3 (n 726); Interview 15 (n 731); Pam Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscape of Justice and Power' (2003) 28 Signs 1233.

<sup>793</sup> Natalie Novick, 'When Those Meant to Keep the Peace Commit Sexualized Violence' (Women Under Siege, 25 May 2012) <<http://www.womenundersiegeproject.org/blog/entry/when-those-meant-to-keep-the-peace-commit-sexualized-violence>> accessed 06 November 2014.

<sup>794</sup> Interview 3 (n 726); Interview 16 (n 747).

<sup>795</sup> Interview 16 (n 747).

#### 6.4 NGOs as groups

Traditional state-centric models are still important in forming our understanding of the international system. Traditional constructions of International Law are deeply engrained and continue to restrict opportunities for NGOs to get involved in international law-making and court procedures. The existing structures and processes of international law-making are struggling to accommodate NGOs' diversity and fluidity.<sup>796</sup> However, this only tells part of the story of how structures shape actors in international law-making. As is discussed further below, NGOs can contribute to international law-making processes in a number of ways. Through their participation, they can facilitate a development away from the traditional state-centric power dynamics of international relations and towards the active participation of a wider range of actors.

The ICC negotiations can be understood as evidence of new diplomacy, where large and small states, international organisations, and NGOs worked together in partnership in which all sides were interested.<sup>797</sup> Cooperation between governments, international organisations and civil society organisations is not a new phenomenon.<sup>798</sup> Especially at the UN, NGOs have played a considerable role since the drafting of its charter. A

“parallel NGO conference with a separate agenda, the NGO forum, has been a feature of most UN conferences and their preparatory meetings since the 1972 Stockholm Conference on the Environment. Supplementing the business of the forum is an extracurricular festival of NGO exhibitions and activities. In all these ways, NGOs seek to influence the governmental agenda, exploit news coverage of the event, and carry on business among themselves.”<sup>799</sup>

In the ICC negotiations, however, no parallel NGO forum was organised. Instead, NGOs participated in all stages of the actual negotiation process. As discussed in detail below, while states still made the final decisions, NGOs became their strategic partners<sup>800</sup> that

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<sup>796</sup> Pearson (n 34) 244.

<sup>797</sup> Interview 17 (n 5); — — ‘Annan Throws Down Gauntlet’ *Terra Viva* (Rome, 16 June 1998) 1; William R Pace, ‘ICC Treaty Passes Half-Way Mark: Croatia, Paraguay and Andorra Bring Ratifications up to 32’ *ICC Monitor* (New York, May 2001) 1, 5; Pearson (n 34) 254.

<sup>798</sup> See for example Charnovitz, ‘Two Centuries of Participation’ (n 145).

<sup>799</sup> Ann Marie Clark, Elisabeth J Friedman and Kathryn Hochstetler, ‘The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN’ (1998) 51 *World Politics* 1, 8.

<sup>800</sup> — — ‘A Court That Is Worth Having’ *Terra Viva* (Rome, 15 June 1998) 6-7; — — ‘Welcome’ *Terra Viva* (Rome, 15 June 1998) 5; Human Rights Watch, ‘World Report 1999’ (n 758); Lindblom (n 34) 474; Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 706.

influenced states' decisions in various ways. The direct participation of NGOs in the ICC negotiations can be understood as a result of the positive relationship between states and NGOs that has developed during the last century. The extent and depth of cooperation and the scale of the targets that the partnership between large and small states, international organisations, and NGOs had set for itself and that it eventually achieved, establishes the ICC process as a "vanguard approach to international diplomacy and the development of international laws and institutions".<sup>801</sup>

Within the analysis of NGOs as important actors in the ICC negotiations, the following sections focus on the CICC as a particular group of NGOs, and the Women's Caucus as a particular group within the CICC. An emphasis is placed on both groups' founding, composition, motivations, general interests, funding, methods and relationships with state delegations

#### *6.4.1 The NGO Coalition for the International Criminal Court (CICC)*<sup>802</sup>

Exemplifying new diplomacy and permeating the boundaries of state-centric models of international relations and law-making, a group of particularly strong, mainly European and US American Human Rights organisations participated in the establishment of an international criminal court from the early 1990s onwards. The organisations were led by the World Federalist Movement, represented by William R Pace.<sup>803</sup> The CICC's founding members also included Amnesty International, represented by Christopher Keith Hall; Human Rights Watch, represented by Richard Dicker; the Lawyers' Committee for Human Rights, represented by Jelena Pejic; No Peace Without Justice/Transnational Radical Party, represented by Emma Bonino; and Parliamentarians for Global Action.<sup>804</sup>

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<sup>801</sup> Pace and Schense, 'Coalition for the International Criminal Court at the Preparatory Commission' (n 34) 706.

<sup>802</sup> See Annex 2 for an organigram of the CICC.

<sup>803</sup> Benedetti and Washburn (n 34) 8-9; Benedetti, Bonneau and Washburn (n 28) 70, 76-77: William R Pace's interests and actions in the ICC negotiations were shaped by his career as a professional official of NGOs dedicated to world peace and the development of international organisations. Pace recognised the importance of the solidarity between members of the CICC, which he preserved and used as needed. Together with his personal strengths, he influenced the ICC discussions this way.

<sup>804</sup> For more information on these actors see Benedetti, Bonneau and Washburn (n 28) 68-73; Mariacarmen Colini, 'The Experience of No Peace Without Justice' in Alessandro Fodella and others (eds), *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press 2004).

Some of these NGOs later became members of the self-appointed CICC Steering Committee which provided policy and programme coherence for the Coalition's efforts and activities.<sup>805</sup>

The organisations that founded the CICC maintained long-standing relationships with diplomats, scholars and the United Nations Secretariat. They participated in the work of the ILC on the establishment of a permanent international criminal court from 1994 onwards.<sup>806</sup> When the ILC submitted its draft statute for a permanent international criminal court in 1994, the group was disappointed by the UNGA's decision not to convene an international conference and shocked about the willingness of friendly states to compromise on key issues. This motivated them to found the CICC.<sup>807</sup>

The founding of the CICC arguably stands as an example of a "fortunate coincidence"<sup>808</sup> where people with coinciding values came together; where structures shaped actors. Initially, the CICC encouraged diplomats to call for a preparatory process and a diplomatic conference for the establishment of a permanent international criminal court.<sup>809</sup> In cooperation with the LMG, the Coalition later pushed to realise the idea of a fair, free and independent international criminal court. It was perceived to be necessary to create a permanent institution that, unlike the *ad hoc* tribunals, was independent of the UNSC on the one hand, and specific cases and situations on the other. Like many Western governments, the CICC envisaged a fair, free and independent international criminal court to fill an impunity gap.<sup>810</sup>

The coalition approach facilitated equality between large and small NGOs.<sup>811</sup> However, it has to be noted that the NGOs that are experienced in dealing with core global

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<sup>805</sup> Interview 8 (n 744); Interview 11 (n 733); Colini (n 804) 107: The Steering Committee included Amnesty International, Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Human Rights Watch, the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action and the World Federalist Movement.

<sup>806</sup> Interview 8 (n 744); Interview 11 (n 733); — — 'Legalese Aside, NGOs Want Independent, Effective Court' *Terra Viva* (Rome, 16 June 1998) 7; Benedetti and Washburn (n 34) 21.

<sup>807</sup> Interview 8 (n 744); Interview 11 (n 733).

<sup>808</sup> Interview 6 (n 735); Benedetti, Bonneau and Washburn (n 28) 75.

<sup>809</sup> Interview 8 (n 744); Benedetti, Bonneau and Washburn (n 28) 79-81.

<sup>810</sup> Interview 3 (n 726); Interview 8 (n 744); Interview 11 (n 733); Spees, 'Women's Advocacy in the Creation of the International Criminal Court' (n 792).

<sup>811</sup> Pearson (n 34) 279.

governance issues are big international organisations mostly from the global North. They are well-connected to other, mainly Northern, NGOs, developing a clear core-periphery structure and, therefore, a hierarchy.<sup>812</sup> However, even though the CICC itself was founded by exactly those international Western organisations, its membership broadened to include Latin American and African NGOs but only a few civil society groups from North Africa, Asia and the Middle East. Latin American and African NGOs were motivated to participate in the ICC negotiations by their experiences of war and Human Rights abuses.<sup>813</sup> The example of individuals like the Senegalese Lawyer Abdul Koroma, M Cherif Bassiouni<sup>814</sup> and Richard Goldstone as well as the establishment of the ICTR and TRCs, further motivated African civil society groups to become involved.<sup>815</sup> The low number of North African, Asian and Middle Eastern NGOs that participated in the ICC negotiations might have been related to the weakness in the development of International Law, in particular of Human Rights, in these regions.<sup>816</sup>

“A glance at the ratification record of existing human rights treaties – for instance, the [ICCPR] or the Convention Against Torture – shows that, regardless of their official ideology, states in North Africa and the Middle East and Asia are least likely to become parties. Many Asian human rights groups have tried unsuccessfully for years to set up an Asian human rights system. It is not surprising, then, that their enthusiasm for setting up an even more forceful human rights implementation mechanism, one that their governments would be even less likely to participate in, was lukewarm. The situation in the Middle East and North Africa is even bleaker. In many of the countries in this region, there is not enough political space for human rights groups to operate freely, let alone to campaign for a Court that might have the authority to bring leaders of their governments to justice for human rights abuses.”<sup>817</sup>

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<sup>812</sup> Glasius, *The International Criminal Court* (n 34) 36; Helmut Anheier and Hagai Katz, ‘Global Connectedness: The Structure of Transnational NGO Networks’ in Helmut Anheier, Marlies Glasius and Mary Kaldor (eds), *Global civil society 2005/6* (Sage 2006) 255-256.

<sup>813</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 145-146.

<sup>814</sup> Benedetti and Washburn (n 34) 9; Benedetti, Bonneau and Washburn (n 28) 101-103: M Cherif Bassiouni’s interests and behaviour in the ICC negotiations were influenced by his experiences as diplomat as well as his scholarly work and knowledge. He gave expert advice to governments who respected and trusted him because of his personal strengths, experience and commitment. This way, he made his voice heard. Furthermore, his role as vice-chair of the PrepCom shaped his actions in the ICC negotiation.

<sup>815</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 145-146.

<sup>816</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 145-146; Glasius, *The International Criminal Court* (n 34) 36-37.

<sup>817</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 145-146 (reference omitted).



This confirms the idea that “global civil society and the international rule of law are interdependent and need each other to be able to develop further.”<sup>818</sup>

At the request of other Coalition members, the CICC established an International Secretariat. Continuously, the International Secretariat worked towards maintaining momentum. To this end, it successfully mobilised and coordinated different NGO groups, legal experts and private organisations such as parliamentary, religious, humanitarian, and women’s associations that represented every part of the world. The CICC International Secretariat supported the development of a common strategy and provided information services.<sup>819</sup> This way, the Secretariat contributed towards a high degree of transparency, resulting in inclusivity. It remained neutral in the negotiations so as to maintain the CICC’s cohesiveness. Not taking a position enabled the International Secretariat to identify and expand areas of commonality between CICC members in the face of a plurality of ideas and objectives that existed in the negotiations. This was utilised to uphold relationships with a large number of actors and to contribute the NGOs’ wide range of expertise to all parts of the negotiations. It was possible for the International Secretariat to maintain a neutral position in the ICC negotiations because it was hosted by the World Federalist Movement, whose broad and general mandate allowed the Secretariat to remain neutral on many specific issues.<sup>820</sup> Here, the World Federalist Movement performed its role as convenor, offering a platform for discussion and amplifying voices from the ground through inter-governmental processes.<sup>821</sup> This is not to say that the World Federalist Movement did not engage in substantive work during the ICC negotiations. It was interested in the creation of an international criminal court as it would “entrench certain rights and responsibilities, [...] putting into place a proper panoply of power and relationships where states can be held accountable”.<sup>822</sup> This indicates that the Coalition

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<sup>818</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 146.

<sup>819</sup> Interview 11 (n 733); Benedetti and Washburn (n 34) 21-33; Glasius, *The International Criminal Court* (n 34) 26-27; Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 708; Pace and Schense, ‘The Role of Non-Governmental Organizations’ (n 34) 124-126; Pearson (n 34).

<sup>820</sup> Interview 6 (n 735); Interview 8 (n 744); Coalition for the International Criminal Court, ‘Who We Are & What We Do’ (n 762); Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 708-711.

<sup>821</sup> Interview 8 (n 744).

<sup>822</sup> Interview 6 (n 735).

members followed their own mandate if compatible with the overall CICC goal to create a free, fair and independent court.<sup>823</sup>

The members of the CICC met in groups such as regional and thematic caucuses. Members of regional caucuses lobbied state delegations from their own region. Thematic caucuses were based on shared values and norms to develop their positions and to employ concerted efforts. They were created around issues of children, faith, gender justice, peace and victims.<sup>824</sup>

#### *6.4.1.1 The Women's Caucus*

Of particular relevance for this thesis is the thematic caucus on gender justice, the Women's Caucus, as it was the main actor that played a vital role in ensuring that gender crimes were appropriately addressed as separate crimes as well as constituting other crimes such as torture.<sup>825</sup> Although this was the Caucus' main goal, its areas of interest were broader and in line with the overall goal of the CICC.<sup>826</sup>

Before 1997, the efforts of women's rights advocates and activists were employed at the Vienna, Cairo and Beijing conferences.<sup>827</sup> Therefore, they did not pay much attention to the ICC negotiations. When the PrepCom began, William Pace communicated with Rhonda Copelon<sup>828</sup> about the need to include women's organisations in the CICC as they

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<sup>823</sup> Interview 11 (n 733).

<sup>824</sup> Benedetti and Washburn (n 34) 23; Glasius, 'Expertise in the Cause of Justice' (n 761) 147; Pearson (n 34) 264.

<sup>825</sup> Interview 2 (n 467); Interview 10 (n 432); Interview 11 (n 733); Copelon, 'Gender Crimes as War Crimes' (n 59) 234; Human Rights Watch, 'World Report 1999' (n 758).

<sup>826</sup> Spees, 'Women's Advocacy in the Creation of the International Criminal Court' (n 792) 1234.

<sup>827</sup> Benedetti, Bonneau and Washburn (n 28) 70; Bunch, 'Legacy of Vienna: Feminism and Human Rights' (n 350); Chen (n 34) 477.

<sup>828</sup> Lisa Gormley, 'Rhonda Copelon Obituary' *The Guardian* (London, 24 May 2010) <<http://www.theguardian.com/law/2010/may/24/rhonda-copelon-obituary>> accessed 06 November 2014; Dennis Hevesi, 'Rhonda Copelon, Lawyer in Groundbreaking Rights Cases, Dies at 65' *The New York Times* (New York, 08 May 2010) <[http://www.nytimes.com/2010/05/09/nyregion/09copelon.html?\\_r=0](http://www.nytimes.com/2010/05/09/nyregion/09copelon.html?_r=0)> accessed 06 November 2014; Women's Caucus for Gender Justice, 'About the Women's Caucus' <<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/aboutcaucus.htm>> accessed 06 November 2014: After having completed a degree in history and political science as well as in law, Rhonda Copelon was a

represented an important constituency among international NGOs and had a considerable capacity for outreach. Although women's rights groups including Equality Now<sup>829</sup> first participated in the third PrepCom meeting in February 1997, it was only after this session that they decided to form a formal caucus.<sup>830</sup>

“[The] women realized that without an organized caucus, women's concerns would not be appropriately defended and promoted. Building on the work of previous caucuses formed around the Vienna, Cairo and Beijing Conferences, and due to the success of [the] ad hoc caucus in [the February 1997 PrepCom] [...], these women decided to form a permanent caucus which would be part of the CICC but autonomous in its function.”<sup>831</sup>

“This decision was helped along by a grant from the MacArthur Foundation, which in turn wanted a caucus structure that could receive and use the gift in an organized way.”<sup>832</sup>

Additional staff – scholars, lawyers and activists specialised in Human Rights and women's rights, most of them with previous experience in international justice work – was recruited.<sup>833</sup> This indicates that expertise of violence against women prevailed over experience of violence. Amongst the Caucus' members of staff were Donna Axel,<sup>834</sup> Alda Facio<sup>835</sup> and Betty Murungi.<sup>836</sup> Another member of the Women's Caucus was María

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professor of law and director of the International Women's Human Rights Law Clinic at the City University of New York School of Law. Working with her students, she filed *amicus* briefs in cases before the ICTY and ICTR. This way, she contributed to the recognition of rape as potentially constituting acts of genocide and torture under International Law.

The International Women's Human Rights Law Clinic at the City University of New York School of Law functioned as the Women's Caucus' Legal Secretariat.

<sup>829</sup> Jessica Neuwirth, 'Equality Now Calls on Women's Movement to Support the ICC' *ICC Monitor* (New York, January 1997) 8.

<sup>830</sup> Benedetti, Bonneau and Washburn (n 28) 70; Women's Caucus for Gender Justice, 'About the Women's Caucus' (n 828).

<sup>831</sup> Women's Caucus for Gender Justice, 'About the Women's Caucus' (n 828); See also Chen (n 34).

<sup>832</sup> Benedetti, Bonneau and Washburn (n 28) 70.

<sup>833</sup> Benedetti, Bonneau and Washburn (n 28) 70; Spees, 'Women's Advocacy in the Creation of the International Criminal Court' (n 792) 1237.

<sup>834</sup> New Jersey City University, 'Donna Axel' <<http://web.njcu.edu/sites/faculty/daxel/content/bio.asp>> accessed 07 November 2014; Austin Ruse, 'UNFPA's Sadik Calls for "Reproductive Freedom" at Annual UN NGO Forum' (C-FAM) <<http://t.c-fam.org/en/issues/un-organizations/112-unfpas-sadik-calls-for-reproductive-freedom-at-annual-un-ngo-forum>> accessed 07 November 2014: Like Rhonda Copelon, Donna Axel is a law professor and women's rights activist. Her field of expertise includes reproductive health for which she has advocated with various international organisations.

<sup>835</sup> Association for Women's Rights in Development, 'An Interview With Alda Facio' (12 February 2008) <<http://www.awid.org/Library/An-Interview-with-Alda-Facio>> accessed 07 November 2014; Benedetti, Bonneau and Washburn (n 28) 70; Women's Human Rights Education Institute, 'Faculty Profiles' <<http://learnwhr.org/about/>> accessed 07 November 2014: Alda Facio is a feminist Human Rights activist,

Eugenia Solís.<sup>837</sup> At the time of the Rome Conference, the Women's Caucus had more than 300 women's organisations and 500 individual members. Twelve to fifteen people were present at Rome at any time during the conference.<sup>838</sup>

The Caucus received funding<sup>839</sup> from a foundation headquartered in the US to bring survivors and women working on the ground with survivors in various countries to New York and Rome. Survivors of sexualised war violence who participated in the ICC negotiations were at the same time activists. They were members of the Caucus' delegation and had direct input into its positions. Additionally, emails were sent out, outlining positions the Women's Caucus thought about adopting and asking for feedback. Contacts in different countries would then reach out to local women and organisations to collect their views and feed those back to the Caucus who would take them into account when drafting its final positions.<sup>840</sup>

In general, however, only a few survivors were involved in the ICC negotiations and had the opportunity to shape international rules. Amongst them were Barnes de Carlotto, Abuela, Rachel Edralin-Tigalo and Robert Green. An advert for a press conference in the second issue of *Terra Viva*, the conferences' daily newspaper, indicates

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jurist and writer with decades of experience in both grassroots movements and more formal legal and UN contexts. She has carried out hundreds of trainings on women's Human Rights with an emphasis on CEDAW for judges, the police and judicial officials throughout Latin America as well as for women's and civil society organisations throughout the world.

<sup>836</sup> Madre, 'Women's Rights Exchange' <<http://www.madre.org/index/press-room-4/womens-rights-exchange-15/network-of-experts-89.html>> accessed 07 November 2014; Women's Caucus for Gender Justice, 'About the Women's Caucus' (n 828); Betty Murungi was the chair of the Women's Caucus' Executive Committee. She is a Kenyan lawyer and women's Human Rights activist. Her experiences in international Human Rights organisations include being a consultant and legal advisor to the International Center for Human Rights and Democratic Development on gender-related crimes at the ICTR.

<sup>837</sup> Madre (n 836): María Eugenia Solís was the Women's Caucus' only Guatemalan member. She is a feminist professor and attorney with expertise in Human Rights and women's rights. She has been involved in feminist activism in the national and international arena.

<sup>838</sup> Glasius, 'Expertise in the Cause of Justice' (n 761) 143, 147; Women's Caucus for Gender Justice, 'Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence' (June 2000) <<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/062000pc/elementsannex.htm>> accessed 23 January 2014.

<sup>839</sup> Women's Caucus for Gender Justice, 'The Women's Caucus for Gender Justice has received support from' <<http://iccwomen.org/wigjdraft1/Archives/oldWCGJ/index.html>> accessed 10 February 2015: The Women's Caucus received funding in general from the CICC, the Ford Foundation, the Global Fund for Women, the MacArthur Foundation, Rights and Democracy, the Shaler Adams Foundation, UNIFEM, the United Methodists and Urgent Action Fund as well as from the governments of Canada, Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland (UK).

<sup>840</sup> Interview 17 (n 5); Interview 19 (n 483).

that parents of victims were given the opportunity to speak about their experiences.<sup>841</sup> However, Hebe de Bonafini and Evel Pertini, two members of Madres de Plaza de Mayo, were forcibly led away after disrupting a speech by Argentinian Justice Minister Raul Enrique Castillo as they were not accredited participants of the Rome Conference. Security guards further prevented them from presenting their case to the press.<sup>842</sup>

The Women's Caucus guided the work of its members. This was necessary because of the geographic scope of its members and the wide range of activities undertaken.<sup>843</sup> The Caucus provided orientation sessions before PrepCom sessions for new members, some of whom still had to be persuaded about the Women's Caucus' positions so that they could lobby governments accordingly.<sup>844</sup> In regard to the Women's Caucus' drafting work and lobbying, at the ICC negotiations, in Vienna, Cairo and Beijing,<sup>845</sup> the members of the Caucus discussed the language they wanted to introduce in a democratic and cooperative fashion.<sup>846</sup> At this stage, only women were involved.<sup>847</sup> The initiative often came from Copelon.<sup>848</sup> This indicates that the Caucus' members as individual actors shaped the Caucus' values and norms. Its positions were informed by thorough research on relevant existing treaties and case law, and based on (survivors') experiences of the Nuremberg, Tokyo, Yugoslavia and Rwanda tribunals.<sup>849</sup> This indicates that personal and international values, norms and rules mattered in the Women's Caucus' discussions. Different members then approached delegates from different states, suggesting that normative structures influenced actors. Who they approached depended on evaluations of who might be empathetic towards their concerns and requests based on the general orientation of the respective state's government.<sup>850</sup> The Women's Caucus had good relations amongst others with "Australia, Bosnia, Canada, Costa Rica, Mexico, the Netherlands, European countries

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<sup>841</sup> — — 'Parents of Victims Take the Floor' *ICC Monitor* (New York, 16 June 1998) 4.

<sup>842</sup> — — 'Madres Thrown Out After Disrupting Argentina Speech' *Terra Viva* (Rome, 18 June 1998) 1.

<sup>843</sup> Interview 8 (n 744); Interview 11 (n 733).

<sup>844</sup> Interview 8 (n 744); Interview 11 (n 733).

<sup>845</sup> Chen (n 34).

<sup>846</sup> Interview 5 (n 735); Interview 10 (n 432).

<sup>847</sup> Interview 19 (n 483).

<sup>848</sup> Interview 5 (n 735); Interview 7 (n 467); Interview 9 (n 430); Interview 10 (n 432).

<sup>849</sup> Interview 17 (n 5); Interview 19 (n 483).

<sup>850</sup> Interview 5 (n 735); Interview 10 (n 432).

generally, South Africa for ten Southern African countries and Sweden”.<sup>851</sup> Moreover, contacts were established based on shared nationality as well as through personal commonalities, trust and understanding. Here, the importance of informal contacts and personal values becomes apparent.<sup>852</sup> Even though many men did not see gender issues as international crimes, members of the Women’s Caucus found that most friendly delegates were men. This is to be expected, considering that most delegates at the ICC negotiations were men.<sup>853</sup> The impact of personal values can also be seen in the different styles of lobbying that different members of the Women’s Caucus applied. In conversations with state delegates, some Caucus members went on to the next point after agreement had been reached on a certain issue. Others continued to bring forward arguments supporting a particular point the Women’s Caucus raised even after agreement had been reached with a delegate.<sup>854</sup> This supports the opinion voiced that NGOs provided alternative or additional lines of reasoning to a proposal rather than drafting one themselves.<sup>855</sup> Some members of the Women’s Caucus were very attached to their language, very definite about it and disappointed when it was changed. Others acknowledged that compromises were necessary.<sup>856</sup> This raises the question whether it was more important to achieve a satisfactory overall outcome than to include certain wordings in the ICC instruments.<sup>857</sup> It raises the question whether the words that are used in a definition is only interesting from a theoretical point of view but less so in practice. After all, in practice, it has to be kept in mind that meanings of terms may change from one language to the other and distinctions exist in one but not the other.<sup>858</sup> After having reached agreements or compromises on the Caucus’ proposals, delegates would officially propose them. It has to be stressed that this did not happen out of pure empathy towards the Women’s Caucus. Rather, state delegations that presented the Caucus’ proposals did so based on evaluations of their own experiences and of how the Women’s Caucus’ positions fitted with those of the state

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<sup>851</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 159; See also Benedetti, Bonneau and Washburn (n 28) 71.

<sup>852</sup> Interview 5 (n 735); Interview 6 (n 735); Interview 17 (n 5).

<sup>853</sup> Interview 5 (n 735); Interview 9 (n 430); Interview 10 (n 432); Interview 14 (n 750); Interview 19 (n 483); Copelon, ‘Gender Crimes as War Crimes’ (n 59) 220, 233.

<sup>854</sup> Interview 5 (n 735); Interview 10 (n 432).

<sup>855</sup> Interview 4 (n 736).

<sup>856</sup> Interview 5 (n 735); Interview 10 (n 432).

<sup>857</sup> Interview 6 (n 735).

<sup>858</sup> Interview 18 (n 5).

delegation in question.<sup>859</sup> Here again, personal and national values, norms and rules influenced actors.

Although the Women's Caucus' advocacy strategy was effective, it was also exclusive. It disregarded state delegations that were perceived to have contrary opinions or shared no common ground with the Caucus. These delegations in turn were not aware of women's rights at stake and saw other issues like the inclusion of non-core crimes and the relationship between the UNSC and the court as dominating the discussions. They perceived the negotiations to have taken place without a strong women's lobby.<sup>860</sup> This illustrates the significance of penetrating an environment that is not very gender-sensitive by networking delegates.<sup>861</sup>

In pursuing the objective of ensuring that gender crimes were appropriately addressed, the Women's Caucus enjoyed the cooperation and support of many of CICC's members who endorsed papers the Caucus had drafted, sharing its views. This was crucial for the Caucus' overall success.<sup>862</sup> However, the Women's Caucus also encountered opposition from a small number of government delegations who perceived it to be in "pursuit of a purely [feminist] political agenda rather than the contribution of legal expertise based on the real-life experience of war-affected women and survivors of sexual violence".<sup>863</sup> Voicing male norms,

"delegates considered attention to the prerequisites of gender justice to be unnecessary, since, in their perception, 'neutral rules would take care of it.' For many, it was the first time they had to deal with a women's rights agenda and with its advocates as an organized force. Many had 'advice' or criticism for the Caucus: 'Don't be so pushy;' 'You're not dressed properly'; 'Don't worry, we'll take care of your concerns.'"<sup>864</sup>

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<sup>859</sup> Interview 17 (n 5); Interview 18 (n 5).

<sup>860</sup> Interview 14 (n 750).

<sup>861</sup> Interview 1 (n 730); Interview 2 (n 467); Interview 11 (n 733); — — 'Women-Friendly Tribunal Sought' *Terra Viva* (Rome, 17 June 1998) 8.

<sup>862</sup> Interview 11 (n 733).

<sup>863</sup> Pace and Schense, 'Coalition for the International Criminal Court at the Preparatory Commission' (n 34) 719.

<sup>864</sup> Rhonda Copelon as cited in Rothschild (n 34) 99.

While some governments were hostile, others were unsupportive. A member of the German delegation, for example, voiced male norms and indicated that NGOs' active participation in the negotiations was acceptable as long as it was in line with states' positions.<sup>865</sup> It was said that the German delegation

“was not concerned with women. It was not a crucial question for [the German delegates and they had no stakes in the matter]. [They] took it for granted that the ICTY had moved significantly ahead. [The delegates] realised that [International Humanitarian Law] in particular but also crimes against humanity have to take into consideration issues of women, [the protection] of women [and their sexual identity and sexual liberty] [...] [and that] attacks against women should not be perceived as [...] collateral damage [...]. [The German delegation] did not have a problem with the women's NGOs [...] running the show as long as they [...] did not create significant problems for the overall compromise [like they did in relation to the crime of enforced pregnancy]. [After all,] this [was] not the Vienna Conference on Human Rights”.<sup>866</sup>

The French delegation adopted a similar point of view. The exact definitions of the crimes of rape and sexual slavery and, by extension, forced marriage were no “big deal”<sup>867</sup> for them and the concept of gender was viewed “not [to] translate very well into French”.<sup>868</sup> It was “not [seen as] very French”<sup>869</sup> but rather as an Anglo-Saxon or American movement. Indicating that personal values mattered, their female chief of delegation still was close to the Women's Caucus. She gave her team instructions to support the group, especially in its struggle against the Holy See. The delegation “would have [supported the Caucus] with or without the instructions [though] because actually [they] believed in [...] the things the Women's Caucus was saying.”<sup>870</sup> However, as any delegation, the French had hard and soft points in the negotiations. Disagreement arose, for example, over the element of coercion in relation to rape. While the Women's Caucus was understood to have argued that coercive circumstances automatically negate any consent, the French delegation drew on the state's experience of the Second World War. It was argued that many French women had genuine relationships with German soldiers. Therefore, not all sexual

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<sup>865</sup> Interview 15 (n 731).

<sup>866</sup> Interview 15 (n 731); See also Lindblom (n 34) 472.

<sup>867</sup> Interview 16 (n 747).

<sup>868</sup> *ibid.*

<sup>869</sup> *ibid.*

<sup>870</sup> *ibid.*



encounters between people of any background in war could be classified as rape.<sup>871</sup> This illustrates that the Caucus was perceived to only “focus on one thing and ignore the rest”<sup>872</sup> and therefore to simplify things.<sup>873</sup>

In addition to hostile and unsupportive governments, the Women’s Caucus also encountered opposition from different NGOs. In the early phase of the Women’s Caucus’ involvement in the ICC negotiations, some NGOs “felt that the [...] Caucus’ objectives would dilute the key messages as well as human rights definitions and concepts.”<sup>874</sup> Some NGOs saw the Caucus’ “sectoral interest to be at odds with what they considered to be the more central issues, such as jurisdiction or trigger mechanisms. In these cases, the Women’s Caucus was often portrayed as rigid, intrusive, and uncompromising.”<sup>875</sup> Other NGOs considered the Caucus not to be very important, did not want to be associated with it and consequently did not support its proposals. Other NGOs like Redress shared the views of the Women’s Caucus and agreed that the issues the Caucus addressed were of relevance. However, Redress had to follow its own mandate that required the organisation to focus on different concerns.<sup>876</sup> Other NGOs opposed the Women’s Caucus because of values and norms grounded in religious objections to the gender provisions in the Rome Statute, especially the provisions relating to forced pregnancy in Article 7. Prompted by concerns raised by the Holy See in regard to the term ‘gender’, North American conservative Christian NGOs got more involved in the negotiations.<sup>877</sup> Particularly

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<sup>871</sup> *ibid.*

<sup>872</sup> *ibid.*

<sup>873</sup> *ibid.*

<sup>874</sup> Benedetti, Bonneau and Washburn (n 28) 71.

<sup>875</sup> *ibid.*

<sup>876</sup> Interview 17 (n 5); For more information on REDRESS and the ICC negotiations see Benedetti, Bonneau and Washburn (n 28) 72-73.

<sup>877</sup> Interview 17 (n 5).

Glasiu, *The International Criminal Court* (n 34) 32, 121; Marlies Glasiu, ‘Who is the Real Civil Society? Women’s Groups versus Pro-Family Groups at the International Criminal Court Negotiations’ in Jude Howell and Diane Mulligan (eds), *Gender and Civil Society* (Routledge 2004); Pearson (n 34): Pro-family groups that participated in the ICC negotiations included the Canadian group Campaign Life Coalition, the Catholic Family and Human Rights Institute, Human Life International, the International Right to Life Federation and REAL (Realistic Active for Life) Women of Canada. Pro-family groups used similar lobbying tactics to the Women’s Caucus and the CICC. They focused their attention on sympathetic states, circulated position papers and aimed at influencing their governments’ position on the ratification of the Rome Statute this way. However, they were also accused of not playing according to the rules, making handouts without identifying themselves as the authors and destroying other delegations’ documents. Even though pro-family groups made their voices heard, the cohesiveness, size and strength of the CICC as well as the relative lack of support from a majority of states made it impossible for these NGOs to effectively influence the negotiation process and outcomes. They were marginalised at the ICC negotiations.

noticeable for their destructive, highly emotive, intimidating and harassing behaviour during the Rome Conference, 'pro-family' groups caused difficulties with other NGOs, especially the Women's Caucus.<sup>878</sup> The Caucus, in response, became more careful and secretive when discussing issues in public, falling silent when strangers joined their group.<sup>879</sup>

Similarly to NGOs prioritising other questions, it was argued that individuals also corrupted the debate about gender issues and sexualised violence by continuously advancing strong opinions, for example about the relationship between sexualised violence and pornography. Acting strategically and knowing how to organise enabled them to make their voices heard.<sup>880</sup>

#### 6.4.2 *Forms of participation*

As mentioned above, the Women's Caucus shared some objectives and advocacy strategies with the CICC in general. In the PrepCom and at Rome, NGOs were highly visible. They closely monitored and distributed information on the status of the negotiations, co-sponsored news conferences, expert meetings, public debates, seminars, symposia and workshops, and co-ordinated parallel activities conducted by NGOs. In addition to very directed and sometimes aggressive lobbying, NGOs facilitated exchange, discussion and participation amongst others through meetings and communicating with UN officials and members of state delegations.<sup>881</sup> Aiming at moderating and neutralising states' positions, these meetings were conducted to give states the opportunity to discuss controversial issues on a technical rather than political basis. Here, the CICC would state the facts regarding a certain issue and aim to provide a way out for disagreeing

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<sup>878</sup> Interview 11 (n 733); Glasius, *The International Criminal Court* (n 34) 32, 121; Pearson (n 34).

For more information on the pro-family groups and their relationship to the Women's Caucus see Glasius, 'Who is the Real Civil Society?' (n 877).

<sup>879</sup> Interview 5 (n 735).

<sup>880</sup> Interview 9 (n 430).

<sup>881</sup> Interview 1 (n 730); Interview 8 (n 744); Interview 17 (n 5); Interview 18 (n 5); Benedetti and Washburn (n 34) 21-33; Coalition for the International Criminal Court, 'History of the ICC' (n 28); Glasius, 'Expertise in the Cause of Justice' (n 761) 150; Glasius, *The International Criminal Court* (n 34) 31-32, 39, 43-46, 115; Human Rights Watch, 'World Report 1999' (n 758); Lindblom (n 34) 471-477; Pace and Schense, 'The Role of Non-Governmental Organizations' (n 34); Pearson (n 34).

delegations.<sup>882</sup> The larger groups within the CICC were the intellectual leaders of the Coalition. Amongst them were Amnesty International, Human Rights Watch, the International Service for Human Rights, the Lawyers Committee for Human Rights and the International Commission for Jurists. They produced, circulated and promoted new research and expert documents including journal articles and reports, aiming to inform and influence “a specialist public of NGOs, academics, and state representatives on specific sub-themes, promoting certain alternatives over others with reference to precedent, legal argument, or political realities”.<sup>883</sup> This way, they provided the context for the decisions that were to be made by states. These forms of NGO participation in law-making negotiations were taken as a sign of NGOs’ growing professionalism.<sup>884</sup> Smaller groups were often more effective at disseminating information, networking and building coalitions.<sup>885</sup> In addition to lobbying, producing expert documents, trying to influence the negotiating bodies’ reports to the UNGA, disseminating information to the wider public and convening conferences, Amnesty International, No Peace Without Justice and others also staged street actions in the form of demonstrations, signature lists, human carpets and vigils.<sup>886</sup>

In recognition of the CICC’s role in the proceedings to establish an international criminal court, the CICC’s International Secretariat was asked by the UN to organise the accreditation of NGOs to the Rome Conference. This was a unique form of self-regulation that had not been attempted before at international conferences.<sup>887</sup>

Through regional and national networks and initiatives, CICC members raised awareness of the establishment of an international criminal court and developed important personal contacts at a local level. They circulated position papers and supported and coordinated inter-sessional meetings, contributing to national policy-making and therefore

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<sup>882</sup> Interview 8 (n 744); Interview 11 (n 733).

<sup>883</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 150.

<sup>884</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761).

<sup>885</sup> Benedetti, Bonneau and Washburn (n 28) 77.

<sup>886</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761).

<sup>887</sup> Interview 8 (n 744); Glasius, ‘Expertise in the Cause of Justice’ (n 761) 146-147; Lindblom (n 34) 459.

Glasius, ‘Who is the Real Civil Society?’ (n 877): In deciding which NGOs to accredit, coordinator William Pace tried to treat all groups on an equal footing. He only turned down a very low number of government-organised NGOs. In addition to this CICC-led accreditation, it was also made possible for NGOs who did not wish to go through this procedure to apply directly to Roy Lee, the UN official in charge of organising the conference. This way, about sixteen groups were added to the list.

influencing normative structures.<sup>888</sup> This way, CICC members contributed to the capacity-building and mobilised policy advocacy of local NGOs to pressure their governments at home.<sup>889</sup> During the PrepCom2 negotiations, the CICC joined the LMG in insisting that the PrepCom2 should protect the integrity of the Rome Statute. They wanted to avoid that the statute would be reopened for discussion and its spirit would be changed.<sup>890</sup> However, the CICC decided to focus its efforts on influencing structures by addressing shortcomings of the statute at the national level through promoting the adoption of strong national implementing legislation. The Coalition gathered information about national ratification processes, discussed with delegates the obligations which would come with ratifying the Rome Statute, briefed them and NGOs on progress towards entry into force, and planned activities at national and regional level.<sup>891</sup> Therefore, NGOs had a mediating role between the international and national level.

#### *6.5 The relationship between the CICC and state delegations*

As mentioned before, the CICC worked in cooperation with state delegations. Especially through consultative roles with a growing number of governments, particularly from the LMG, the CICC developed into a strategic partner in the whole course of the negotiations.<sup>892</sup> The growing acceptance of NGOs was facilitated by their acceptance of the culture and style of international treaty conferences as well as of the fact that national policy positions are better addressed through dialogue than by condemnation. NGOs knew that they had to win fights through their arguments, and they did. Early and open discussions prevented confrontations with written (counter-)proposals.<sup>893</sup> NGOs were realistic about the kind of involvement they sought. They knew and accepted that states

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<sup>888</sup> Benedetti and Washburn (n 34) 21-33; Coalition for the International Criminal Court, 'History of the ICC' (n 28); Glasius, *The International Criminal Court* (n 34) 31-32, 39, 43-46; Human Rights Watch, 'World Report 1999' (n 758); Pace and Schense, 'The Role of Non-Governmental Organizations' (n 34); Pearson (n 34).

<sup>889</sup> Interview 8 (n 744).

<sup>890</sup> Pace and Schense, 'The Role of Non-Governmental Organizations' (n 34) 140-141.

<sup>891</sup> Pace and Schense, 'Coalition for the International Criminal Court at the Preparatory Commission' (n 34) 706, 710.

<sup>892</sup> — — 'A Court That Is Worth Having' (n 800); — — 'Welcome' (n 800); Human Rights Watch, 'World Report 1999' (n 758); Lindblom (n 34) 474; Pace and Schense, 'Coalition for the International Criminal Court at the Preparatory Commission' (n 34) 706.

<sup>893</sup> Interview 4 (n 736).

made the final decisions.<sup>894</sup> At Rome, NGOs did not seek speaking rights or access to crucial informal meetings as it was important to keep government delegations satisfied. NGOs recognised the importance of the ICC negotiations being largely a state-based process for the ultimate success of the court. Therefore, NGOs promoted and galvanised broad state support.<sup>895</sup> However, “[m]any ‘like-minded’ countries would agree with the assessment...that without the NGOs there would never have been an agreement on a court”.<sup>896</sup> As indicated above however, the partnership between states and NGOs was not always an easy one due to different organisational structures, presuppositions and interests influencing government delegations’ and NGOs’ short-term and long-term goals and working methods. CICC members, for example, were concerned about the focus of the LMG on unanimity and the disproportionate power this granted to uncompromising delegations, causing tensions.<sup>897</sup> States’ willingness to engage with NGOs was issue-dependent.<sup>898</sup> Generally, a positive synergy existed between Canadian NGOs and the state’s delegation. The actors had a common outlook and were supportive towards the Canada’s Human Security Agenda. When minds did not meet, however, relationships worsened. This was the case in relation to the conservative Christian organisations mentioned above and the crime of forced pregnancy.<sup>899</sup> Similarly, when NGOs touched political raw nerves like the protection of states’ soldiers, cooperation lessened.<sup>900</sup> However, governments did not want to oppose NGOs publicly. Therefore, before the negotiations began, members of NGOs were sometimes taken aside by state representatives and told they would not get what they wanted, and how the negotiations were going to go.<sup>901</sup> Like the Canadian example above, this indicates that NGOs had to dance to states’

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<sup>894</sup> Interview 11 (n 733); Interview 17 (n 5).

<sup>895</sup> Interview 8 (n 744); Benedetti and Washburn (n 34) 21-33; Coalition for the International Criminal Court, ‘History of the ICC’ (n 28); Glasius, *The International Criminal Court* (n 34) 31-32, 39, 43-46; Pace and Schense, ‘The Role of Non-Governmental Organizations’ (n 34); Pearson (n 34); Rothschild (n 34) 100.

<sup>896</sup> Reuters News Service as cited in Amnesty International, ‘Introduction to the NGO Coalition for an International Criminal Court (CICC)’ (2000) <[http://www.iccnw.org/documents/AIDocumentCICC\\_en.pdf](http://www.iccnw.org/documents/AIDocumentCICC_en.pdf)> accessed 24 January 2014.

<sup>897</sup> Lindblom (n 34) 471-476; Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 723.

<sup>898</sup> Interview 4 (n 736); Benedetti and Washburn (n 34) 21-33; Coalition for the International Criminal Court, ‘History of the ICC’ (n 28); Glasius, *The International Criminal Court* (n 34) 31-32, 39, 43-46; Pace and Schense, ‘The Role of Non-Governmental Organizations’ (n 34); Pearson (n 34).

<sup>899</sup> Interview 17 (n 5); Lindblom (n 34) 471.

<sup>900</sup> Interview 16 (n 747).

<sup>901</sup> Interview 3 (n 726).

tunes. Relationships between NGOs and state delegations were generally constructive until NGOs disagreed with states' positions. In such cases, cooperation lessened. State delegations also did not want NGOs around when they were trying to reach a compromise, wanting to avoid the NGOs' moral voice and being held morally responsible. The discussion about the inclusion or exclusion of nuclear and chemical weapons stands as an example here. As mentioned above, the NAM, especially Syria, argued for either both kinds of weapons to be included in, or excluded from, the Rome Statute. Since member states of the North Atlantic Treaty Organization would not have ratified the statute if it would have explicitly prohibited the use of nuclear weapons, a compromise was reached to exclude any reference to chemical and nuclear weapons.<sup>902</sup> In contrast, state delegations decided not to waste negotiation capital on something that they subjectively considered harmless or a waste of time. The inclusion of crimes against UN personnel in the war crimes provision of the Rome Statute stands as an example here. This way, states accumulated negotiation capital that they used in regard to issues they could not compromise on. Consequently, the most sensitive issues could be the least controversial ones.<sup>903</sup>

## 6.6 *Logics of interaction*

The above paragraph demonstrated that actors mutually influenced each other in the ICC negotiations. Chapter 6 also showed that actors' identities, interests and actions were influenced by normative structures through the logic of consequences (instrumentalism), appropriateness (morality and ethics), practicality (practice), arguing (rational oppositional discourse), purposive role playing and habit (unreflected action).<sup>904</sup> The British and French concerns regarding the protection of their own people from potential prosecution before the ICC can be interpreted to have been driven by the logic of consequences. The potential prosecution of their own citizens would have been against their interests and a high price to pay for closing a gap in British and French foreign policy armour. As the participation of African states in the ICC negotiation was motivated by

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<sup>902</sup> Interview 15 (n 731).

<sup>903</sup> Interview 3 (n 726); Wilmshurst, 'Report on the Conference for the Establishment of an International Criminal Court' (n 785).

<sup>904</sup> Brunnée and Toope (n 138) 7.

experiences of war and Human Rights abuses, their involvement can be interpreted to have been driven by the logic of appropriateness. They acted on the basis of what social norms deem right; the prompt prosecution of those responsible. The Women's Caucus' lobbying can be interpreted to have been driven by the logic of practicality and arguing. Its members approached state delegates they thought might be empathetic towards their concerns as well as state delegates with whom they had something in common. Women's Caucus' members presented a series of statements and/or reasons to persuade members of state delegations of the Caucus' views so that members of state delegations would eventually officially introduce them. State delegations would then consider the Caucus' proposals based on their own positions. NGOs' general identity and actions in the ICC negotiations can be interpreted to have been based on the logic of purposive role playing. NGOs accepted the culture and style of international treaty negotiations and consequently were accepted by, and seen as partners of, state delegations. Potentially following the logic of habit in the sense of unreflected action, state delegations who opposed the Women's Caucus "considered attention to the prerequisites of gender justice to be unnecessary, since, in their perception, 'neutral rules would take care of it'." <sup>905</sup>

## *6.7 Conclusion*

This chapter has shown that actors and normative structures mutually influenced each other in the ICC negotiations, confirming the constructivist circle. In regard to actors, it was demonstrated that individuals, states and NGOs played an important role in the negotiations (Research Question 1). This confirmed Hypothesis 1 <sup>906</sup> and Martha Finnemore's theory that NGOs matter in international relations and law-making. In regard to structures, it was highlighted that personal, national and international values, norms and rules mattered (Research Question 2). <sup>907</sup> This supported the theories of both Finnemore and Peter Katzenstein that international and national normative structures influence international relations. The example of the Bosnian delegation referred to above draws most of these factors together. Influenced by his country's experiences (national) in the

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<sup>905</sup> Rhonda Copelon as cited in Rothschild (n 34) 99.

<sup>906</sup> Hypothesis 1 reads: NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

<sup>907</sup> Research Question 2 reads: What influenced the driving actors?

war in the 1990s, the Bosnian ambassador (personal) was keen to have sexualised violence included in the ICC list of war crimes (international). Therefore, he actively supported (personal) instructions received from the Bosnian government (national) to make sure that the instruments and jurisprudence of the ICTY (international) would be considered in drafting the ICC instruments (international). This example also shows how normative structures (values and norms based on national experiences) shape actors (the Bosnian ambassador) who again shaped normative structures (the ICC instruments). When adding to this the Women's Caucus, which was the main actor advocating the inclusion of various sexualised crimes in the Rome Statute, the crucial role NGOs played in the negotiations becomes apparent.

Normative structures can be interpreted to have influenced the identities, interests and actions of actors in the ICC negotiations through the logic of consequences (instrumentalism), appropriateness (morality and ethics), practicality (practice), arguing (rational oppositional discourse), purposive role playing and habit (unreflected action). This confirmed the first part of the constructivist circle: normative structures shape actors (Research Question 2).<sup>908</sup>

Exploring state delegations as groups showed that states formed coalitions partly based on shared values, norms and rules, partly changing traditional dynamics of international negotiations. This already indicates that national norms can explain fundamental changes in states' identities as international actors. This was confirmed, using the examples of the UK and France where changes in national power dynamics, and consequently national norms, led to changes in the states' identities in the ICC negotiations. However, civil society members who became members of state delegations and maintained and argued for their original points serve as an example of a situation in which national norms and rules had no impact on the negotiations, refuting Katzenstein. The discussion of the level of engagement of actors from the global North and South also showed that in addition to normative reasons, actors' (in-)actions were motivated by practical and strategic considerations. Financial issues, the lack of awareness and competence, considerations related to a state's international image and nationalist arguments were brought up in this context. Nevertheless, the example of African states as actors in the ICC negotiations confirms the constructivist circle and refutes Hypothesis

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<sup>908</sup> Research Question 2 reads: What influenced the driving actors?



4.<sup>909</sup> Experience assigned African states the moral authority to push for an effective court because of their history of colonisation and establishment of TRCs. Their identity in the ICC negotiations was determined by national and international norms and rules. African states as actors also influenced international rules by signing the Rome Statute. In addition to social engineering potentially limiting the opportunities for certain actors to shape international rules, the same result was achieved by prioritising English over other languages, especially in informal meetings, as well as by insisting on consensus in decision-making.

Part four of this chapter engaged with Hypothesis 1<sup>910</sup> and Martha Finnemore's claim that NGOs matter in international relations and international law-making processes because they teach their views to states. It moved away from a state-centric view on the ICC negotiations and analysed NGOs as a group that played a crucial role as well. NGOs directly and indirectly influenced the process and substance of the negotiations. The Women's Caucus played a vital role in ensuring that gender crimes were appropriately addressed as crimes in and of themselves as well as forms of other listed crimes such as torture. The Caucus also advocated the creation of an independent and fair court that would be associated with peace. While more specific views of NGOs, especially on sexualised crimes, are discussed in the following chapters, this chapter already highlighted that the Women's Caucus formed its views based on the input of survivors of sexualised violence and women working with survivors, refuting Hypothesis 4.<sup>911</sup> The Women's Caucus also formed its views based on its members' personal backgrounds as well as on their research into existing values, norms and rules, especially those of the *ad hoc* tribunals and the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict. When combining Chapter 6 with Chapter 4, it becomes apparent that the Women's Caucus' composition and strategy was based on experiences of previous international conferences (Research Question 2).<sup>912</sup> At Vienna, Cairo, Beijing and Rome, women's organisations incorporated members from all over the world. Therefore, it was crucial to build consensus through discussion. Women's

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<sup>909</sup> Hypothesis 4 reads: Survivors of war rape and forced marriage and actors from the global South were not involved.

<sup>910</sup> Hypothesis 1 reads: NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

<sup>911</sup> Hypothesis 4 reads: Survivors of war rape and forced marriage and actors from the global South were not involved.

<sup>912</sup> Research Question 2 reads: What influenced the driving actors?

organisations were active at local, national, regional and international level at all stages of the negotiation processes. To influence the negotiations effectively, they had to understand how international law-making conferences work. Women's organisations had to be well prepared, conduct research and policy analysis, document acts of violence against women, produce and distribute reports, organise briefings and lobby state delegations. Through cooperation with the media, they generated publicity for their agendas. In addition to building bridges between different women's NGOs and activists as well as between women's organisations and the media, women's organisations bridged NGOs and state delegations by influencing the latter's composition (Research Question 4).<sup>913</sup>

Chapter 6 explored some more general views held by the CICC and how it came to hold them (Research Question 2).<sup>914</sup> The CICC supported the establishment of a free, fair and independent permanent international criminal court because it was necessary to act upon lessons learned from challenges encountered in relation to the ICTY and ICTR, as well as to fill an impunity gap. At Rome, the NGO Coalition was concerned about the focus on unanimity because it ascribed disproportionate power to dissenting voices and consequently could cause tensions. After Rome, the CICC was of the opinion that strong national legislation implementing the Rome Statute was needed due to the shortcomings of the instrument. Throughout the whole negotiation process, the Coalition's International Secretariat remained neutral so as to maintain the CICC's cohesiveness, to identify and expand areas of commonality between CICC members, to uphold relationships with a large number of actors and to contribute the NGOs' wide range of expertise to all parts of the negotiations. Therefore, it was a strategic decision made possible by the World Federalist Movement's broad mandate. The World Federalist Movement itself supported the creation of an international criminal court because it would "entrench certain rights and responsibilities, [...] putting into place a proper panoply of power and relationships where states can be held accountable".<sup>915</sup>

While this chapter did not go into detail demonstrating that NGOs in the ICC negotiations taught their views to states, it addressed various ways how NGOs influenced states (Research Question 4).<sup>916</sup> Central to this was the high visibility of NGOs during the

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<sup>913</sup> Research Question 4 reads: How did the driving actors influence the ICC negotiations of war rape and forced marriage?

<sup>914</sup> Research Question 2 reads: What influenced the driving actors?

<sup>915</sup> Interview 6 (n 735).

<sup>916</sup> Research Question 4 reads: How did the driving actors influence the ICC negotiations of war rape and forced marriage?

ICC negotiations. Furthermore, networking and cooperation between NGOs at multiple levels, as well as between NGOs and states, was crucial. NGOs monitored the negotiations, furthering transparency. They distributed information, shared their research and expertise, held regular meetings and briefings and organised news conferences and parallel activities. They facilitated participation, provided a platform for discussion and exchange, mediated between different actors, facilitated compromises and participated in preliminary drafting work. Maintaining momentum, they continuously raised awareness, engaged in capacity building, provided orientation and guidance and mobilised NGO engagement and participation. A common strategy, concerted efforts and the work in caucuses was made possible by, and contributed to, the cohesiveness of the group of NGOs involved. A very effective structure and organisation was extremely necessary due to the large number and diversity of the actors involved, as well as the wide range of activities undertaken. NGOs based their work on personal, national and international values, norms and rules talked about in democratic discussions. They amplified voices from the ground; voices of survivors of sexualised violence and those working with them. In their lobbying, they addressed supposedly friendly state delegations and delegations with which they expected to have common ground. Especially the latter highlights the importance of personal and informal contacts, creating trust and understanding. State delegations in turn evaluated NGOs' proposals in a similar fashion, based on experiences and the compatibility with the respective state's positions. Overall, NGOs provided the context for decisions that were to be made. They shaped the space and substance of the negotiations. What was noticed by state delegations as the growing professionalism of NGOs – their acceptance of the culture of international treaty-making negotiations, their realistic assessment of the kinds of involvement they sought and their recognition of the crucial role of states as final decision-makers – made it possible for NGOs to influence state actors' identities and actions.<sup>917</sup>

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<sup>917</sup> Chapters 4 and 5 covered some of the ways in which NGOs and non-governmental advocates and activists (here excluding employees of international tribunals) influenced the jurisprudence of international tribunals at investigation and trial stage. They submitted *amicus curiae* briefs like the Coalition on Women's Human Rights in Conflict Situations for example in *Prosecutor v Jean-Paul Akayesu* adjudged by the ICTR. Non-governmental advocates and activists like an international NGO coalition comprised of Human Rights Watch and the International Centre for Human Rights and Democratic Development wrote critical letters to courts. The above mentioned groups also contributed expert opinions like Zainab H Bangura in *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (AFRC case) before the Special Court for Sierra Leone (SCSL).

In addition to demonstrating that NGOs played an important role in the ICC negotiations (confirming Hypothesis 1)<sup>918</sup> and succeeded in influencing the identities and actions of state actors, this chapter also refuted Hypothesis 4. Hypothesis 4 states that it was expected to find that survivors of sexualised war violence as well as actors from the global South were not involved in the ICC negotiations of the definitions of war rape and forced marriage. This chapter mentioned that the Women's Caucus included, and worked with, survivors of sexualised violence. Therefore, survivors directly influenced and shaped the outcomes of the ICC negotiations. However, it has to be noted that, overall, the participation of survivors was an exception. In contrast, the direct involvement of actors from the global South was facilitated throughout NGO and state coalitions by providing various necessary resources like financial support, personnel and information. Civil society actors from all regions of the world were represented and actively engaged in the ICC negotiations as members of the CICC.

However, a word of caution seems necessary here. According to Adriaan Bos, the chair of the ICC negotiations until Rome, civil society actors “[fill] in gaps arising from a democratic deficit in the international decision-making process.”<sup>919</sup> As Marlies Glasius summarised, they can foster deliberation, develop alternative proposals, promote access and give a voice to those unheard, increase transparency for, and accountability to, the wider public, and diminish power distortions among states.<sup>920</sup> This chapter showed that NGOs in the ICC negotiations indeed developed alternative proposals and promoted access. NGOs also made the official state debates more deliberative and less focused on narrow interests.

“Numerous conferences and seminars, the Sicilian retreats, academic articles, and NGO position papers contributed to a global, albeit specialist, debate on the merits of the international criminal court, which informed and influenced the ultimate decision-making by state delegates.”<sup>921</sup>

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<sup>918</sup> Hypothesis 1 reads: NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

<sup>919</sup> Adriaan Bos, ‘The International Criminal Court: Recent Developments’ in Herman AM von Hebel, Johan G Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press 1999) 44-45.

<sup>920</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 162.

<sup>921</sup> *ibid.*

When it comes to internal deliberation and transparency, however, it has to be noted that no thorough debate and no formal collective decision-making took place within the CICC.<sup>922</sup>

“Partly this was for practical reasons, because of the number of NGOs, the cumbersome internal decision-making procedures of some NGOs, and the onslaught of events, and partly because it was deemed too divisive to get into controversial matters. Partly, too, the NGO Coalition lacked the kind of culture of consensus reflecting commitments to social transformation, non-violence, and representation of popular demands.”<sup>923</sup>

The Coalition emphasised pluralism rather than internal democracy.<sup>924</sup> As mentioned in this chapter, big international NGOs are the most experienced and best connected. Therefore, their impact on international negotiations and their outcomes are more significant than those of smaller, less experienced and less well-connected organisations, creating inequalities and hierarchies. Even though the CICC included and represented civil society actors from all over the world, those actors found themselves under the guidance and leadership of international Human Rights groups.<sup>925</sup> When it comes to giving a voice to those unheard, it has to be noted that even though the Women’s Caucus included survivors of sexualised violence and women working with them on the ground, many civil society representatives were “well-heeled, university-educated cosmopolitans with little direct experience of violence”.<sup>926</sup> The presence of grass-roots representatives like the members of Madres de Plaza de Mayo appears to have served a symbolic purpose rather than actually involving them in the negotiations. This emphasises expertise rather than experience.<sup>927</sup>

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<sup>922</sup> *ibid.*

<sup>923</sup> John Burroughs and Jacqueline Cabasso, ‘Confronting the Nuclear-Armed States in International Negotiating Forums: Lessons for NGOs’ (1999) 4 *International Negotiation* 474.

<sup>924</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 162.

<sup>925</sup> Benedetti and Washburn (n 34) 21-22; Glasius, *The International Criminal Court* (n 34) 26-27; Pace and Schense, ‘Coalition for the International Criminal Court at the Preparatory Commission’ (n 34) 708; Pace and Schense, ‘The Role of Non-Governmental Organizations’ (n 34).

<sup>926</sup> Glasius, ‘Expertise in the Cause of Justice’ (n 761) 163.

<sup>927</sup> *ibid.*

## **7 The ICC negotiations of war rape and forced marriage: Actors' identities, influences and understandings**

### *7.1 Introduction*

After Chapter 6 focused on the identities of actors involved in the ICC negotiations (Research Question 1) and on what influenced them in general (Research Question 2) as well as on ways how NGOs influenced states (Research Question 4), the aim of Chapter 7 is to analyse who the key actors were that drove the negotiations of the definitions of war rape and forced marriage in times of armed conflict specifically (Research Question 1). It also examines why these driving actors got involved in the ICC negotiations of these two crimes and which international, national or personal values, norms or rules influenced them and their positions (Research Question 2).<sup>928</sup> The main goal of Chapter 7 is to examine how these actors interpreted the crimes of war rape and forced marriage (Research Question 3).

Chapter 6 showed that international NGOs, in particular the Women's Caucus, played a role in the development of International Criminal Law regarding sexualised crimes in general, how it came to hold its views and how it influenced states. Chapter 7 presents a more detailed snapshot of two specific sexualised crimes, war rape and forced marriage in times of armed conflict. Addressing Research Question 1,<sup>929</sup> Chapter 7 demonstrates that the Women's Caucus was a driving actor regarding the criminalisation of war rape and forced marriage as a form of sexual slavery. It is emphasised that NGOs actually did teach their views to states. Regarding the Women's Caucus' opposition, it is shown that the Arab block raised concerns regarding the criminalisation of war rape and sexual slavery, based on their national laws, religious principles and cultural norms (Research Question 1<sup>930</sup> and 2,<sup>931</sup> confirming Hypothesis 2).<sup>932</sup> This highlights the tension that existed in the negotiations between issues of national sovereignty and the extent of the

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<sup>928</sup> See also Chapters 8 and 9.

<sup>929</sup> Research Question 1 reads: Who were the driving actors in the process of defining war rape and seeking to define forced marriage?

<sup>930</sup> Research Question 1 reads: Who were the driving actors in the process of defining war rape and seeking to define forced marriage?

<sup>931</sup> Research Question 2 reads: What influenced the driving actors?

<sup>932</sup> Hypothesis 2 reads: States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage.

ICC's jurisdiction. It also confirms Hypothesis 3<sup>933</sup> and Peter Katzenstein's theory that national normative structures matter in international relations by indicating that domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage in International Criminal Law. Consequently, the crimes were at least partially interpreted as questions of honour, confirming Hypothesis 5.<sup>934</sup> However, the reference to cultural norms also indicates an understanding of rape as a form of structural violence. This was also the approach taken by the Women's Caucus in regard to both war rape and forced marriage (Research Question 3),<sup>935</sup> speaking against Hypothesis 6.<sup>936</sup> As in the previous chapter, actors are portrayed as shaping normative structures and *vice versa*. As this is considered obvious in the following discussion, it will not be explicitly noted throughout the chapter.

Chapter 7 is divided into two parts. First, it focuses on the crime of rape, then on forced marriage. For both, developments in the PrepCom, Rome Conference and PrepCom2 are analysed in turn. Regarding the crime of rape, the discussions and outcomes of the Ad Hoc Committee and the Zutphen inter-sessional meeting<sup>937</sup> are also mentioned. Before concluding, both parts discuss the logics of interaction that influenced actors' identities, interests and actions in the ICC negotiations of the definitions of war rape and forced marriage.

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<sup>933</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

<sup>934</sup> Hypothesis 5 reads: War rape and forced marriage were interpreted as honour crimes.

Hypothesis 2, 3 and 5 will be further elaborated on in Chapter 9.

<sup>935</sup> Research Question 3 reads: What was the driving actors' understanding of war rape and forced marriage?

<sup>936</sup> Hypothesis 6 reads: Structural causes of the perpetration of war rape and forced marriage were not addressed.

<sup>937</sup> M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) (3) Cornell International Law Journal 443; Coalition for the International Criminal Court, 'History of the ICC: Zutphen Meeting 1998' <<http://www.iccnw.org/?mod=zutphen>> accessed 20 November 2014: "During an Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, the Bureau [, consisting of Chairman Adriaan Bos, vice-chairpersons M Cherif Bassiouni, Sylvia Fernandez de Gurmendi and Marek Madej, who resigned and was replaced by Peter Tomka, and Rapporteur Juan Yoshida, who resigned and was replaced by Masataka Okano,] and coordinators of the [PrepCom] restructured a set of draft articles. The technically consolidated draft consisted of 99 articles, most of which were heavily bracketed, indicating a continued lack of agreement. The Zutphen draft was submitted to the March-April 1998 session of the Preparatory Committee and formed the basis of the draft considered during the Rome Conference."

## 7.2 Rape

### 7.2.1 *The Ad Hoc Committee on the Establishment of an International Criminal Court*

The Ad Hoc Committee was formed by the UNGA in 1995 to “review the major substantive and administrative issues arising out of the [ILC] draft statute [for an international criminal court] [...] and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.”<sup>938</sup> To this purpose, the Ad Hoc Committee met twice and submitted its report to the UNGA in 1995.<sup>939</sup>

The following paragraphs discuss the ILC draft statute and the work of the Ad Hoc Committee on the subject of war rape. They analyse the identities (Research Question 1) and understandings (Research Question 3) of actors involved in the discussion of the crime of war rape at the early stages of the ICC negotiations.

The ILC’s draft statute<sup>940</sup> lists the categories of crimes the ICC was to have jurisdiction over without elaborating on their content. The annex lists the fourth Geneva Convention and Additional Protocol I which explicitly include the crime of rape. In its commentary to Article 20, the ILC referenced Article 5 of the ICTY statute which also includes rape as a crime against humanity. Rape could therefore be considered to be included in the ILC draft statute by reference.

Based on this, some delegations at the 1995 Ad Hoc Committee identified sexualised war violence as an issue and called for the inclusion of rape and other similar offences as war crimes and crimes against humanity in the statute of a permanent international criminal court.<sup>941</sup> At this early stage in the negotiation process, two international NGOs supported this. Amnesty International and the International Commission of Jurists, however, did not advocate the inclusion of rape as a crime in and of itself that could constitute a war crime or a crime against humanity if the general qualifications are met. Instead, Amnesty International spoke out for the inclusion of rape as

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<sup>938</sup> Ad Hoc Committee on the Establishment of an International Criminal Court (n 29) para 255.

<sup>939</sup> Ad Hoc Committee on the Establishment of an International Criminal Court (n 29).

<sup>940</sup> International Law Commission ‘Report of the International Law Commission on the Work of its forty-sixth Session, 2 May - 22 July 1994’ (1994) UN Doc A/49/10 chapter II.

<sup>941</sup> Ad Hoc Committee on the Establishment of an International Criminal Court (n 29) para 76.



an act potentially constituting torture.<sup>942</sup> The International Commission of Jurists advocated the inclusion of “outrageous assaults on personal dignity, such as sexual assault and enforced prostitution, (in both cases when used as a political weapon)”<sup>943</sup> as a crime against humanity. The 1996 Draft Code of Crimes includes rape as a crime against humanity<sup>944</sup> as well as “outrages upon personal dignity in violation of international humanitarian law, in particular [...] rape”.<sup>945</sup>

Delegates were aware<sup>946</sup> that rape as an outrage upon personal dignity invokes outdated, victim-centred notions of honour instead of stressing that rape is a violation of a person’s integrity and (sexual) autonomy. Instead of codifying unacceptable conduct, including rape as an outrage upon personal dignity in the draft statute legitimised the view of war rape as an honour crime. Arguably, however, categorising war rape in this way can also be interpreted to have been recognition that some societies see rape as an honour crime. A compromise would have been a view of rape as a violation of honour being an aggravating factor rather than an element of the crime.<sup>947</sup>

### 7.2.2 *The Preparatory Committee* on the Establishment of an International Criminal Court (*PrepCom*)

Following the Ad Hoc Committee’s recommendations, the UNGA created the PrepCom to “combine further discussions [of issues] with the drafting of texts, with a view to preparing a consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.”<sup>948</sup> Between March

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<sup>942</sup> Christopher Keith Hall, ‘Challenges Ahead for the United Nations Preparatory Committee Drafting a Statute for a Permanent International Criminal Court’ (1996) Amnesty International 13 <[http://www.iccnw.org/documents/AIPreCommittee1996\\_en.pdf](http://www.iccnw.org/documents/AIPreCommittee1996_en.pdf)> accessed 05 December 2013.

<sup>943</sup> Interview 11 (n 733); International Commission of Jurists, ‘Third ICJ Position Paper’ (August 1995) <<http://www.iccnw.org/documents/1PrepCmt3rdPositionPaperICJ.pdf>> accessed 05 December 2013.

<sup>944</sup> International Law Commission ‘Draft Code of Crimes against the Peace and Security of Mankind’ (17 July 1996) 51 UN GAOR Supp (No. 10) at 14, UN Doc A/CN.4/L.532, corr.1, corr.3 art 18(j).

<sup>945</sup> International Law Commission ‘Draft Code of Crimes against the Peace and Security of Mankind’ (n 944) art 20(d).

<sup>946</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 613.

<sup>947</sup> Interview 19 (n 483).

<sup>948</sup> *ibid.*

1996 and April 1998, the PrepCom met six times at the UN headquarters in New York. In January 1998, the inter-sessional meeting in Zutphen, the Netherlands, took place to technically consolidate and restructure the draft articles into a draft statute.<sup>949</sup>

The following sections analyse the PrepCom negotiations of the crime of war rape. They cover the first, third, fifth and sixth PrepCom session as well as the Zutphen inter-sessional meeting because war rape was explicitly discussed in these sessions. Therefore, they shed light on the key actors in the negotiations of war rape (Research Question 1), what influenced them (Research Question 2), and how they understood the crime (Research Question 3).

#### *7.2.2.1 First session, March/April 1996*

Following on from the Ad Hoc Committee's work, consensus existed in the first PrepCom session held in March/April 1996 that definitions of crimes need to be included in the ICC statute to make it more specific and meet the requirement of legality. International rules in the form of international conventions and statutes, as well as the *ad hoc* tribunals' definitions of crimes against humanity, were considered as precedents. However, they were seen as not clear enough and in need of further elaboration.<sup>950</sup> On war crimes, state delegations spoke out for the inclusion of, amongst others, the 1907 Hague rules, the grave breaches provisions of the Geneva Conventions, Common Article 3 and relevant provisions of Additional Protocol I and II as well as the ICTY and ICTR instruments in the statute of an international criminal court.<sup>951</sup>

The PrepCom's report on its proceedings during its first session can be interpreted as male, creating a hierarchy of crimes by stating that crimes like murder, extermination and enslavement, but not rape, need clarification. Therefore, the PrepCom Chairman Adriaan Bos<sup>952</sup> and the delegations of Japan,<sup>953</sup> the Netherlands,<sup>954</sup> New Zealand<sup>955</sup> and the

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<sup>949</sup> Coalition for the International Criminal Court, 'History of the ICC' (n 28).

<sup>950</sup> Elizabeth Wilmschurst, 'International Criminal Court: PrepCom 25 March – 12 April 1996' (30 March 1996); Elizabeth Wilmschurst, 'International Criminal Court: PrepCom 25 March – 12 April 1996' (15 April 1996).

<sup>951</sup> Wilmschurst, 'International Criminal Court: PrepCom 25 March – 12 April 1996' (n 950).

<sup>952</sup> PrepCom 'Chairman's Informal Text No. 2: Article 20 quarter, Crimes against Humanity' (29 March 1996) UN Doc A/AC.249/1996/WG.1/IP.2.

UK<sup>956</sup> submitted proposals to add crimes of sexualised violence, either in the text or in footnotes, without elaborating on the acts. The proposals include rape committed on national or religious grounds,<sup>957</sup> as part of a campaign of ethnic cleansing<sup>958</sup> and as an outrage upon personal dignity.<sup>959</sup> Resonating with Amnesty International’s proposal mentioned above and Article 3 of the ICTR statute, it was also suggested in the first PrepCom session to refer to “[cruel treatment including] torture [, rape and other serious assaults of a sexual nature]”.<sup>960</sup> In an informal text, the chairman also proposed to include “rape [or other serious assaults of a sexual nature]” as a crime against humanity.<sup>961</sup> The potential inclusion of a reference to other serious assaults of a sexual nature, however, creates and perpetuates a hierarchy of acts of sexualised violence, assuming that acts falling short of a physical invasion are less serious than acts of rape. This, however, may be contrary to the experiences of survivors.<sup>962</sup>

The Chairman’s Revised Informal Text on war crimes includes rape in square brackets<sup>963</sup> as “violence to life, health and physical or mental well-being of persons, in particular [...] [rape] [and sexual violence]”.<sup>964</sup> Comparable to the proposals of Austria,<sup>965</sup>

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<sup>953</sup> PrepCom ‘Crimes against Humanity (Japanese Text)’ (26 March 1996) <<http://www.legal-tools.org/doc/d21c80/>> accessed 07 February 2014.

<sup>954</sup> PrepCom ‘Crimes against Humanity (Delegation of the Netherlands)’ (27 March 1996) <<http://www.legal-tools.org/doc/63f87a/>> accessed 07 February 2014.

<sup>955</sup> PrepCom ‘Crimes against Humanity (Delegation of New Zealand)’ (30 March 1996) <<http://www.legal-tools.org/doc/10ff0d/>> accessed 07 February 2014.

<sup>956</sup> PrepCom ‘Article 20 quater: Crimes against Humanity ((Delegation of the United Kingdom)’ (26 March 1996) <<http://www.legal-tools.org/doc/d7a59c/>> accessed 07 February 2014.

<sup>957</sup> PrepCom ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I’ (13 September 1996) UN Doc A/51/22[Vol.I] para 98.

<sup>958</sup> United Nations, ‘Crimes against Humanity Must be Precisely Defined Say Speakers in Preparatory Committee for International Court’ Press Release L/2763/Rev.1 3rd Meeting (AM) (26 March 1996) <<http://www.un.org/press/en/1996/19960326.l2763.html>> accessed 29 April 2015. For a discussion of individuals and communities as targets of war rape see section 4.2.1 as well as parts 5.2 and 10.5.

<sup>959</sup> PrepCom ‘Proposal by Austria on Crimes against Humanity’ (26 March 1996) <<http://www.legal-tools.org/doc/f6d477/>> accessed 07 February 2014. For a discussion of the categorisation of rape as an outrage upon personal dignity see section 7.2.1.

<sup>960</sup> PrepCom ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II’ (13 September 1996) UN Doc A/51/22[Vol.II] 68.

<sup>961</sup> PrepCom ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II’ (n 960) 65.

<sup>962</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>963</sup> Schabas (n 26) 658: Square brackets indicated that the inclusion of a particular element or a particular wording was still under discussion.

<sup>964</sup> PrepCom ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II’ (n 960) 61; See also PrepCom ‘Draft: Optional Approaches to the Definition of War Crimes

Egypt<sup>966</sup> and New Zealand,<sup>967</sup> but contrary to the Chairman's Informal Text No. 4,<sup>968</sup> the crime was also listed under "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"<sup>969</sup> in international and non-international conflicts. Creating a link between rape and indecent assault as well as humiliating and degrading treatment respectively has a similar effect as categorising rape as an outrage upon personal dignity and an honour crime discussed above.<sup>970</sup>

Contrary to the majority of proposals that advocated adding crimes of sexualised violence but did not elaborate on the acts, the US suggested three definitions of rape. Initially, it defined the elements of the crime against humanity of rape to be "(1) [t]hat the accused committed an act of sexual intercourse or forcible sodomy with a person; (2) [t]hat the act of sexual intercourse or forcible sodomy was done unlawfully by force and without consent".<sup>971</sup> 'Sexual intercourse' was understood as "the penetration, however slight, of any orifice of the body, by any part of another's body or by an object."<sup>972</sup> 'Forcible' was determined to include "the use of force or threat of force against the victim or a third person."<sup>973</sup> Disconnecting rape and "forcible sodomy" but establishing a connection between rape and enforced prostitution, the US developed a second definition of "[r]ape or enforced prostitution, meaning causing a person to engage in [or submit to] a

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(Delegation of Egypt)' (29 March 1996) <<http://www.legal-tools.org/doc/d78835/>> accessed 07 February 2014.

<sup>965</sup> PrepCom 'Proposal by Austria on Serious Violations of the Laws and Customs Applicable in Armed Conflicts' (02 April 1996) <<http://www.legal-tools.org/doc/302b0d/>> accessed 07 February 2014.

<sup>966</sup> PrepCom 'Draft: Optional Approaches to the Definition of War Crimes (Delegation of Egypt)' (n 964).

<sup>967</sup> PrepCom 'War Crimes (Delegation of New Zealand)' (30 March 1996) <<http://www.legal-tools.org/doc/af17c3/>> accessed 07 February 2014.

<sup>968</sup> PrepCom 'Chairman's Informal Text No. 4: Article 20 ter, War Crimes' (04 April 1996) UN Doc A/AC.249/1996/WG.1/IP.4.

<sup>969</sup> PrepCom 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II' (n 960) 61.

<sup>970</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50). For further discussion on the categorisation of rape as an honour crime see section 4.2.1.

<sup>971</sup> PrepCom 'Redraft of the ILC Article 20 on ICC Jurisdiction With Proposed Elements (Delegation of the United States)' (22 March 1996) <<http://www.legal-tools.org/doc/efc778/>> accessed 07 February 2014.

<sup>972</sup> *ibid.*

<sup>973</sup> *ibid.*

sexual act by force or threat of force.”<sup>974</sup> A third definition that was also included in the PrepCom’s report on its proceedings during its first session defines the crime against humanity of rape as “causing a person to engage in or to submit to a sexual act by force or threat of force”.<sup>975</sup> The US definitions of rape show a move away from an initial coercion- and consent-based definition to a purely coercion-based understanding. The definitions also show a move away from the use of the term ‘penetration’ to a broader and more neutral definition of rape as a forced sexual act. While the first definition explicitly includes sexual acts committed with objects, it appears to be implied in the second and third definition. The second and third definition are gender-neutral. They define rape as a forced sexual act without unnecessarily specifying the assailant, their sex/gender or the specifics of the sexual act. Mentioning force or threat of force, the US definitions can also be interpreted to be broad enough to include non-physical coercion.<sup>976</sup>

#### 7.2.2.2 *Third session, February 1997*

The USA’s advocacy for gender-neutral rape definitions was in line with awareness-raising efforts launched by women’s organisations in the course of the third PrepCom session in February 1997.<sup>977</sup> In addition to advocating broad and gender-neutral definitions of rape, the number of state proposals indicating an honour-based, and therefore victim-centred, understanding of the crime made it crucial for women’s organisations to place a focus on the crime of the perpetrator, not on the victim. It had to be stressed that the victim is not responsible for what happened to her.

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<sup>974</sup> PrepCom ‘For Annex to Statute: Elements Related to Article on Crimes against Humanity (Delegation of the United States)’ (27 March 1996) <<http://www.iccnw.org/documents/USCrimesAgainstHumanity.pdf>> accessed 05 December 2013.

<sup>975</sup> PrepCom ‘For Annex to Statute: Elements Related to Article on Crimes against Humanity (Delegation of the United States)’ (02 April 1996) <<http://www.legal-tools.org/doc/4d62f1/>> accessed 07 February 2014; PrepCom ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II’ (n 960) 69.

<sup>976</sup> Spees, ‘Women’s Advocacy in the Creation of the International Criminal Court’ (n 792) 1241.

<sup>977</sup> Erb (n 40) 425-426; Athena Gassoumis, Gail Lerner and Mary Marrow, ‘Women’s Caucus Brings Crimes Against Women to Forefront of Debate’ *ICC Monitor* (May 1997) 5.

Based on research by the ICRC,<sup>978</sup> New Zealand and Switzerland<sup>979</sup> submitted a proposal understanding rape as constituting a grave breach of the Geneva Conventions by wilfully causing great suffering. This indicates that non-state actors taught their views on sexualised crimes as breaches of International Humanitarian Law to states. In the first PrepCom session, New Zealand spoke out for the inclusion of rape as an outrage upon personal dignity. As mentioned above, this view is victim-centred. Rape as wilfully causing great suffering, in contrast, focuses on the acts of the perpetrator. Even though this can be interpreted as progress, it still misrepresents the character of sexualised violence as its purpose goes beyond harming the victim.<sup>980</sup>

To understand the advancement of including rape as a grave breach, an understanding of the particular time in the ICC negotiation process is important. Throughout the negotiations, but especially in the early stages, actors did not want to risk losing support for the court by pushing the war crimes provisions too far or by including new crimes. Their fall-back position was to copy the grave breaches provisions of the Geneva Conventions and to adopt them one-to-one as war crimes under the jurisdiction of an international criminal court. This way, the ICC grave breaches provisions would save existing provisions and war crimes would at least be included in the new statute. They could always be amended in a review. In addition, actors “wanted to exemplify in the grave breaches provisions the sort of crimes that they would not want [itemised] but actually were [indicated] in there”.<sup>981</sup> Due to International Law’s gender-blind past where rape was treated as collateral damage to every war,<sup>982</sup> rape had to be exemplified, for example, as an act whereby the perpetrator wilfully causes great suffering to the victim

<sup>978</sup> International Committee of the Red Cross, ‘Commentary: Definition of War Crimes: For the Preparatory Committee on the Establishment of an International Criminal Court (1-12 December 1997 Session)’ (14 February 1997) <<http://www.iccnw.org/documents/3PretCmtWarCrimesRedCross.pdf>> accessed 07 May 2015.

<sup>979</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session from 11 to 21 February 1997’ (12 March 1997) A/AC.249/1997/L.5; PrepCom ‘Working Paper Submitted by the Delegations of New Zealand and Switzerland’ (14 February 1997) UN Doc A/AC.249/1997/WG.1/DP.2; See also PrepCom ‘Draft Consolidated Text: War Crimes’ (20 February 1997) UN Doc A/AC.249/1997/WG.1/CRP.2; PrepCom ‘German Synoptical Working Paper on War Crimes’ (25 June 1997) <<http://www.legal-tools.org/doc/0d8997/>> accessed 07 February 2014; PrepCom ‘Preliminary Text: War Crimes’ (20 February 1997) UN Doc A/AC.249/1997/WG.1/IP/REV.1; Steains (n 59) 365.

<sup>980</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>981</sup> Interview 4 (n 736); Interview 18 (n 5).

<sup>982</sup> Kelly Dawn Askin, ‘Women and International Humanitarian Law’ in Kelly Dawn Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Transnational Publishers 1999); Brownmiller, *Against Our Will* (n 59); Mischkowski, ‘Sexualisierte Kriegsgewalt: Strafverfolgung und Wahrheitsfindung’ (n 293).

which constitutes a grave breach of the Geneva Conventions. This way, even if actors would have fallen back on the narrow list of war crimes, only including grave breaches, rape would have been included in the ICC statute.<sup>983</sup> In contrast to this position advocating the one-to-one adoption of the grave breaches provisions of the Geneva Conventions, the ICRC proposed not to cut and paste from these instruments but to include as much as possible. Since an international criminal court should have jurisdiction over the most serious crimes of concern to the international community, it should cover customary law and serious violations of widely accepted treaties.<sup>984</sup> This position could be perceived as conservative as a focus is placed on clarifying existing law but not on developing new crimes. However, it was in line with the ICRC's role as the guardian of International Humanitarian Law. The outcome of this discussion was the exclusion of any direct references to rape in the grave breaches and Common Article 3 provisions of the draft statute. However, based on the Geneva Conventions and Additional Protocol I, and especially based on Additional Protocol II and the Lieber Code, rape was discussed as being illustrative of an outrage upon personal dignity and a violation to life and health, rather than a substantive addition to the grave breaches provisions of the Geneva Conventions.<sup>985</sup>

“[O]utrages upon personal dignity, in particular rape, enforced prostitution and other sexual violence of comparable gravity”<sup>986</sup> was listed as other serious violations of the laws and customs of war. In cases of internal conflict, different options regarding outrages upon personal dignity and wilfully causing great suffering to body or mind were proposed as violations of Common Article 3. Comparable to a working paper submitted by New Zealand and Switzerland,<sup>987</sup> the different options included “[outrages upon personal dignity, in particular humiliating and degrading treatment [rape and enforced prostitution]]”, “[outrages upon personal dignity, in particular rape, enforced prostitution and other sexual violence of comparable gravity]”, and “[wilfully causing great suffering,

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<sup>983</sup> Interview 18 (n 5).

<sup>984</sup> Interview 13 (n 2); International Committee of the Red Cross, ‘Commentary: Definition of War Crimes’ (n 978).

<sup>985</sup> Interview 13 (n 2); International Committee of the Red Cross, ‘Commentary: Definition of War Crimes’ (n 978).

<sup>986</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session from 11 to 21 February 1997’ (n 979); See also PrepCom ‘Draft Consolidated Text: War Crimes’ (n 979); PrepCom ‘German Synoptical Working Paper on War Crimes’ (n 979); PrepCom ‘Informal Working Paper on War Crimes’ (14 July 1997) UN Doc A/AC.249/1997/WG.1/IP/REV.1; PrepCom ‘Informal Working Paper on War Crimes’ (31 October 1997) UN Doc A/AC.249/1997/WG.1/IP; PrepCom ‘Preliminary Text: War Crimes’ (n 979).

<sup>987</sup> PrepCom ‘Working Paper Submitted by the Delegations of New Zealand and Switzerland’ (n 979).

serious injury to body or health, including rape, enforced prostitution and other sexual violence of comparable gravity]”.<sup>988</sup> These different suggestions illustrate the attempt to crystallise what was recognised by states as reflecting customary International Law rather than to develop new crimes.<sup>989</sup> This includes the discussion regarding the relationship between the crime of rape and grave breaches of the Geneva Conventions, Additional Protocol I and II, Common Article 3, and the Lieber Code respectively. Here, it becomes apparent that international rules matter in international relations and law-making.

While existing international rules strongly influenced actors,

“[m]any [state and non-state] delegations felt that [a] separate listing [of acts of sexualised violence] was warranted, as they were concerned that listing sexual violence crimes as ‘outrages on personal dignity’ would represent a step backward, and send the outdated and potentially harmful message that these violent, physical crimes were to be evaluated based on the harm done to the victim’s honour, modesty or chastity”.<sup>990</sup>

Following feminist calls for the separate mention of sexualised crimes, it was suggested to list rape and other sexualised crimes in a separate category distinct from other crimes.<sup>991</sup> “[R]ape or other sexual abuse [of comparable gravity,] or enforced prostitution”<sup>992</sup> was included in the draft statute as a crime against humanity. This was supported by Amnesty International and the ICRC, which also understood rape to potentially constitute torture and inhumane treatment.<sup>993</sup> However, as the brackets indicate, the qualification ‘of comparable gravity’ could potentially be limiting and exclude sexualised abuses falling short of a physical invasion. Thus, it also creates and perpetuates a hierarchy of sexualised crimes. Based on male points of view, it constructs crimes falling short of physical

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<sup>988</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session from 11 to 21 February 1997’ (n 979); See also PrepCom ‘Informal Working Paper on War Crimes’ (14 July 1997) (n 986); PrepCom ‘Informal Working Paper on War Crimes’ (31 October 1997) (n 986).

<sup>989</sup> Interview 13 (n 2); Wilmshurst, ‘International Criminal Court: PrepCom 25 March – 12 April 1996’ (n 950); Dörmann, ‘War Crimes under the Rome Statute of the International Criminal Court’ (n 49) 345.

<sup>990</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 612; See also Steains (n 59) 365.

<sup>991</sup> Interview 6 (n 735); Interview 13 (n 2); Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>992</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session from 11 to 21 February 1997’ (n 979).

<sup>993</sup> Interview 6 (n 735); Amnesty International, ‘Making the Right Choices - Part I - Defining the Crimes and Permissible Defences and Initiating a Prosecution’ (January 1997) 29 <<http://www.iccnw.org/documents/ALMakingRightChoises97PartI.pdf>> accessed 05 December 2013; International Committee of the Red Cross, ‘Commentary: Definition of War Crimes’ (n 978).



invasion as lesser crimes than rape. The risk of the qualification ‘of comparable gravity’ limiting the acts that could be covered by this provision was aggravated by the fact that rape, unlike other listed crimes against humanity, was not defined in the third PrepCom session.

#### 7.2.2.3 Fifth session, December 1997

The fifth PrepCom session in December 1997 saw steps forward and backward regarding the criminalisation of acts of sexualised war violence. The February 1997 progress of introducing an alternative definition of grave breaches including rape in an international criminal court’s statute was not followed up so as to reflect the exact grave breaches language of the Geneva Conventions.<sup>994</sup> However, a reference to grave breaches was included in Article 20(B)(p bis) on “[o]ther serious violations of the laws and customs applicable in international armed conflict”<sup>995</sup> related to sexualised crimes. The acceptance of this wording was facilitated by the understanding that the reference to grave breaches in Article 20(B)(p bis) would introduce a specific threshold, rather than be an element requiring acts of sexualised violence also to amount to one of the crimes mentioned in the grave breaches provisions of the Geneva Conventions, or indicating that sexualised crimes could already be prosecuted as grave breaches.<sup>996</sup> Article 20(D)(e bis) covering “other serious violations of the laws and customs applicable in armed conflicts not of an international character” links the same list of crimes to “serious violation of Article 3 common to the four Geneva Conventions”.<sup>997</sup> Both Article 20(B)(p bis) and (D)(e bis) again confirm that international rules, in the form of the Geneva Conventions, matter in international relations and law-making. They are upheld and used as points of reference.

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<sup>994</sup> Steains (n 59) 365.

<sup>995</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997’ (18 December 1997) UN Doc A/AC.249/1997/L.9/Rev.1; See also PrepCom ‘Informal Working Paper on War Crimes’ (03 December 1997) UN Doc A/AC.249/1997/WG.1/CRP.7; PrepCom ‘Informal Working Paper on War Crimes, Addendum’ (04 December 1997) UN Doc A/AC.249/1997/WG.1/CRP.7/Add.1; PrepCom ‘Informal Working Paper on War Crimes, Option B (Delegations of the United Kingdom and Germany)’ (12 December 1997) <<http://www.legal-tools.org/doc/5adc48/>> accessed 07 February 2014.

<sup>996</sup> Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (n 49) 332; Dörmann, ‘War Crimes under the Rome Statute of the International Criminal Court’ (n 49) 394-395.

<sup>997</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997’ (n 995); See also PrepCom ‘Informal Working Paper on War Crimes’ (n 995); PrepCom ‘Informal Working Paper on War Crimes, Option B (Delegations of the United Kingdom and Germany)’ (n 995).

Against opposition based on the male perception that acts of sexualised violence would already be recognised as other crimes like torture and genocide,<sup>998</sup> a proposal to further delineate the list of these crimes to include “rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence”<sup>999</sup> as war crimes in international and internal conflicts and as crimes against humanity was widely supported.<sup>1000</sup> This demonstrates the “[c]oncerted effort [...] made, not least by [the UK], to reflect the concerns of the women’s groups”.<sup>1001</sup> It is a successful example of the Women’s Caucus “educating”<sup>1002</sup> states, even though the names of crimes that were eventually accepted differed from the ones initially proposed.<sup>1003</sup> To some extent, the establishment of this list of sexualised war crimes and especially the drafting of their elements was a creative legislative exercise as these forms of violence had not constituted war crimes in their own right before the adoption of the Rome Statute and related International Humanitarian Law rules had not been very precise.<sup>1004</sup> Only rape and forced prostitution were explicitly mentioned in the previous PrepCom negotiations. Therefore, the achievement to explicitly include this list of sexualised crimes in the Rome Statute shows that international relations and law-making are not always restricted by existing international normative structures. The extent of this achievement becomes apparent when considering the repeated mantra of the ICC negotiations being a conservative exercise, crystallising existing law but not creating new crimes. Therefore, it was not enough to argue that a form of conduct is wrong and/or a breach of international (customary) law. It had to be recognised as a crime under international (customary) law, resulting in hunts for the slightest hints to substantiate arguments.<sup>1005</sup>

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<sup>998</sup> Copelon, ‘Gender Crimes as War Crimes’ (n 59) 217.

<sup>999</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997’ (n 995).

Elizabeth Wilmschurst, ‘Annex to the ICC Report: Provisions of the Statute’ (23 September 1998): The UK chaired an informal meeting resulting in “minor” adjustments to the language of the list of sexualised crimes.

<sup>1000</sup> Interview 13 (n 2); Human Rights Watch, *Justice in Balance: Recommendations for an Independent and Effective International Criminal Court* (Human Rights Watch 1998); Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>1001</sup> Wilmschurst, ‘Annex to the ICC Report’ (n 999).

<sup>1002</sup> Interview 19 (n 483).

<sup>1003</sup> Cottier (n 41) 435; Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

For more information see for example Boon (n 47); Glasius, ‘Who is the Real Civil Society?’ (n 877).

<sup>1004</sup> Cottier (n 41) 435.

<sup>1005</sup> Interview 18 (n 5).

In the view of the Women's Caucus, the crimes mentioned in the list of sexualised crimes are forms of gender violence. Gender violence was understood as

“the most extreme form of gender discrimination. [It is] violence or violations which target or affect women exclusively or disproportionately because they are women. Gender violence also includes violence or violations which are based on or perpetuate socially constructed or stereotyped gender roles, or the power differential between men and women.”<sup>1006</sup>

Therefore, gender violence is structural violence as social structures such as gender roles or power inequalities between men and women systematically harm or otherwise disadvantage women.<sup>1007</sup>

“Sexual violence, whether directed to women or men, is usually a form of gender violence, since it is an attack on one's gender identity, whether masculine or feminine. That is, women are raped, for example, to control and destroy them as women and to signal male ownership over them as property; men are raped to humiliate them through forcing them in the position of women and, thereby, rendering them, according to the prevailing stereotypes, weak and inferior.”<sup>1008</sup>

Here, the Women's Caucus demonstrated an understanding of rape as sexual violence as a form of gender violence and therefore, a form of structural violence. The Women's Caucus' elaborations on gender violence as structural violence stress that “socially constructed or stereotyped gender roles, or the power differential between men and women”<sup>1009</sup> underlie the perpetration of rape.

#### *7.2.2.4 The inter-sessional meeting in Zutphen, January 1998*

The same list of sexualised crimes as put forwards in the fifth PrepCom session was included in the Zutphen draft. It states that “committing rape, sexual slavery, enforced

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<sup>1006</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1007</sup> Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 *Journal of Peace Research* 167.

<sup>1008</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1009</sup> *ibid.*

prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence” constitutes a serious violation of the laws and customs applicable in international and internal armed conflict.<sup>1010</sup> The draft also lists “rape or other sexual abuse [of comparable gravity,] or enforced prostitution” as crimes against humanity.<sup>1011</sup> It becomes apparent that the list of sexualised crimes included under the war crimes provisions is broader than the sexualised crimes recognised as potentially amounting to crimes against humanity. It includes not only rape, forced prostitution and other forms of sexualised violence (of comparable gravity), but also sexual slavery, enforced pregnancy and enforced sterilization. This disparity in the development of sexualised crimes as war crimes and as crimes against humanity continued throughout the PrepCom2 negotiations and the conclusion of the Elements of Crimes.

#### *7.2.2.5 Sixth session, March/April 1998*

In the run-up to the Rome Conference, the US developed a fourth definition of rape that brings together the definitions the delegation developed in the first PrepCom session. In a Reference Paper, the US defined rape broadly as “attack[ing] a person [...] through acts of a sexual nature”.<sup>1012</sup> In a comment, however, it specified that “[r]ape is the forcible penetration, however slight, of any part of the body of another by the accused’s sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object.”<sup>1013</sup> Focusing on body parts, the reference to the “accused’s sexual organ” suggests a male perpetrator even though the general wording is gender-neutral, as pushed for by the Women’s Caucus. However, the definition also indicates a more informed understanding of the crime of rape as including oral sex and the use of objects in addition to vaginal and anal invasion. Even though oral sex is not explicitly mentioned, this recognises that women can also be perpetrators and men victims of rape.

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<sup>1010</sup> PrepCom ‘Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands’ (04 February 1998) UN Doc A/AC249/1998/L.13 art 20(B)(p bis), art 20(D)(e bis).

<sup>1011</sup> PrepCom ‘Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands’ (n 1010) art 1(g).

<sup>1012</sup> PrepCom ‘Reference Paper Elements of Offenses for the International Criminal Court (Delegation of the United States)’ (27 March 1998) <<http://www.iccnw.org/documents/USElementsofOffensesMarch98.pdf>> accessed 05 December 2013.

<sup>1013</sup> *ibid.*

### *7.2.3 The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference)*

Based on the PrepCom's draft, the UNGA convened the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) from 15 June to 17 July 1998 in Rome, Italy. The purpose of the Rome Conference was to finalise and adopt a convention on the establishment of an international criminal court.<sup>1014</sup> The following paragraphs analyse by whom and how war rape was discussed at Rome.

At the Rome Conference, the contents of the war crimes and crimes against humanity provisions, but not their definitions, were extensively discussed primarily in informal sessions. The official records of plenary meetings<sup>1015</sup> show that many state delegates<sup>1016</sup> favoured the general inclusion of crimes of sexualised war violence in the ICC's jurisdiction as a preventive measure.<sup>1017</sup> Mr Abdullah M Mohammed Ibrahim Al Sheikh of Saudi Arabia, for example, indicated that the inclusion of the crime of rape under the jurisdiction of the ICC was uncontroversial.<sup>1018</sup> State delegates were supported in their position regarding the inclusion of sexualised crimes in the Rome Statute by international organisations and international and regional NGOs like Amnesty International, the Asian Centre for Women's Human Rights and the United Nations

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<sup>1014</sup> Coalition for the International Criminal Court, 'History of the ICC' (n 28).

<sup>1015</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II, Rome, 15 June - 17 July 1998' (2002) UN Doc A/CONR183/13 (Vol. II) 61-129.

<sup>1016</sup> Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Canada, Chile, Costa Rica, Denmark, Finland, Ghana, Israel, Kuwait, Lithuania, Luxemburg, Mexico, Norway, the Philippines, Portugal, Republic of Korea, Samoa, Slovenia, Spain, Trinidad and Tobago, and the USA.

<sup>1017</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II' (n 1015) 70-71, 80.

Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II' (n 1015) 285: Ms Aguiar, delegate of the Dominican Republic, can be understood to support a wider range of acts of sexualised violence to be recognised under the Rome Statute. Without going into further detail, she voiced concerns "that some types of crimes used as methods of war, for instance, sex abuse against women and children, were not contained in the document."

<sup>1018</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II' (n 1015) 293.

Children's Fund.<sup>1019</sup> However, despite extensive discussions, the delegates did not come to an agreement on Paragraph "(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions"<sup>1020</sup> as "other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law".<sup>1021</sup> Regarding crimes against humanity, eventually, a compromise text that explicitly included the crime of rape received wide support. This compromise text created the only way out of repeating, though not resolving, arguments regarding specifications and definitions already put forward in the PrepCom.<sup>1022</sup> It was the only way to reach a solution in the extremely limited time period of six weeks that the Rome Conference lasted.<sup>1023</sup>

Participants in the Rome Conference did not succeed in defining the elements of crimes. Then again, a large group of delegations considered a binding list of elements unnecessary.<sup>1024</sup> At the insistence of the US delegation, however, Article 9 was inserted into the Rome Statute, stating that the elements of crimes would be defined and the definitions would be included at a later date. The USA and a small group of other delegations would have preferred it if binding elements would have been negotiated before the Rome Statute entered into force.<sup>1025</sup> The US was "particularly concerned that those war crimes which were based on international provisions imposing obligations on states should

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<sup>1019</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II' (n 1015) 61-129; — — 'A Court That Is Worth Having' (n 800).

<sup>1020</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum' (14 April 1998) UN Doc A/CONF.183/2/Add.1 20.

<sup>1021</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II' (n 1015) 158, 167, 268; Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum' (n 1020) 15.

<sup>1022</sup> Wilmschurst, 'Report on the Conference for the Establishment of an International Criminal Court' (n 785).

<sup>1023</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II' (n 1015) 268.

<sup>1024</sup> Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 627.

<sup>1025</sup> Wilmschurst, 'Annex to the ICC Report' (n 999); Coalition for the International Criminal Court, 'Definitions of Crimes' *ICC Monitor* (New York, November 1998) 3, 13; Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 627.

be properly defined as regards individual criminal responsibility”.<sup>1026</sup> How important the development of elements of crimes before the Rome Conference was to the delegation is indicated by the fact that it had drafted a full set of elements of crimes against humanity already at PrepCom stage.<sup>1027</sup> However, the US showed flexibility in the negotiations of their paper in the PrepCom2.<sup>1028</sup>

#### *7.2.4 The Preparatory Commission for the International Criminal Court (PrepCom2)*

After the Rome Conference, the PrepCom2 was charged with negotiating complementary documents to the Rome Statute, setting out the ICC’s structure, jurisdiction and functions. This would complete the establishment and contribute to the smooth functioning of the court. The following paragraphs analyse the ICC Elements of Crimes which were negotiated between February 1999 and July 2000.<sup>1029</sup> The Elements of Crimes are of particular relevance to this thesis as they include the definition of war rape which assists the ICC in the interpretation and application of Article 7(1)(g)<sup>1030</sup> covering rape as a crime against humanity, and of Article 8(2)(b)(xxii)<sup>1031</sup> and Article 8(2)(e)(vi)<sup>1032</sup> covering rape as a war crime.<sup>1033</sup> The Elements of Crimes differ from the (draft) instruments negotiated previously as the (draft) instruments listed rape as a crime in and of itself as well as constituting other crimes but did not define it. The rape definitions discussed above were proposed by state delegations but not included in the (draft) instruments. The PrepCom2 met ten times between February 1999 and July 2002. The sections below,

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<sup>1026</sup> Wilmschurst, ‘Annex to the ICC Report’ (n 999).

<sup>1027</sup> PrepCom ‘Redraft of the ILC Article 20 on ICC Jurisdiction With Proposed Elements (Delegation of the United States)’ (n 971).

<sup>1028</sup> Interview 12 (n 743); Interview 13 (n 2); Wilmschurst, ‘ICC: PrepCom. 16 – 26 February 1999’ (n 778); Dörmann, ‘War Crimes under the Rome Statute of the International Criminal Court’ (n 49) 350.

<sup>1029</sup> Bassiouni, *The Legislative History of the International Criminal Court* (n 28) 36; Benedetti, Bonneau and Washburn (n 28); Cassese, Gaeta and Jones (n 26); Coalition for the International Criminal Court, ‘History of the ICC’ (n 28); International Criminal Court, ‘Establishment of the Court’ (n 33); International Criminal Court, ‘Factsheet’ (n 27); Lee, *The International Criminal Court: The Making of the Rome Statute* (n 26); Schabas (n 26).

<sup>1030</sup> Rome Statute (n 4).

<sup>1031</sup> Rome Statute (n4).

<sup>1032</sup> Rome Statute (n 4).

<sup>1033</sup> Rome Statute (n 4) art 9(1).

however, only cover the first five PrepCom2 sessions as the negotiations of the Elements of Crimes were completed in the fifth session.

#### *7.2.4.1 First session, February 1999*

Before the PrepCom2's first session in February 1999, the USA drafted two crucial proposals, one on the elements of crimes against humanity and another on the elements of war crimes. Comparable to wordings suggested previously by the US,<sup>1034</sup> rape was defined as a situation where

“[t]he accused intended to attack one or more persons through acts of a sexual nature. The accused penetrated any part of the body of another person with the accused's sexual organ, or penetrated the anal or genital opening of another person with any object or other part of the accused's body. The penetration was committed by force”.<sup>1035</sup>

Linking rape to sexual slavery, ‘sexual nature’ was understood as “intentional touching of the sexual organs with the intent to arouse either the accused, or the victim or a third party if applicable ([for example], sexual slavery).”<sup>1036</sup> ‘Committed by force’ meant that the sexual act was accomplished by direct or indirect coercion, force or threat of force against the victim or a third person, resulting in the victim fearing that she or a third person would be subjected to physical or psychological violence if the victim would not comply. It was also understood to include situations where the accused would take advantage of an inherently coercive environment. However, “[e]vidence of consent may negate the necessary force element.”<sup>1037</sup> In addition to defining rape itself, Article 8(2)(b)(xxii)(1) of the USA's proposal is followed by a comment, stating that “the existence of specific

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<sup>1034</sup> PrepCom ‘Reference Paper Elements of Offenses for the International Criminal Court (Delegation of the United States)’ (n 1012).

<sup>1035</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (04 February 1999) UN Doc PCINCC/1999/DP.4/Add.1 (Crimes against Humanity) art 7(1)(g)(1)(2), art 7(1)(g)(1)(3); PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (04 February 1999) UN Doc PCINCC/1999/DP.4/Add.2 (War Crimes) art 8(2)(b)(xxii)(1)(3), art 8(2)(b)(xxii)(1)(4), art 8(2)(e)(vi)(1).

<sup>1036</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (04 February 1999) UN Doc PCINCC/1999/DP.4 4.

<sup>1037</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (n 1036) 3.



crimes of sexual violence in Articles 8.2(b)(xxii) and 8.2(e)(vi) does not undermine the fact that those same acts might constitute the essential elements of some other offenses under the Statute.”<sup>1038</sup> This resonates with a proposition made by the Women’s Caucus. The Caucus argued that it is necessary to understand acts of sexualised war violence both as crimes in and of themselves as well as potentially constituting other crimes to avert the danger of marginalising those crimes by not including them when the charges of torture and other general violations are drawn up. This view was supported by a wealth of customary International Law and examples from the ICTY and ICTR, demonstrating that international norms and rules mattered in the ICC negotiations. Furthermore, the prohibition against gender discrimination in the application and interpretation of law requires taking acts of sexualised war violence into account when considering charging and prosecuting other crimes.<sup>1039</sup> Since the US did not include this understanding in its previous draft elements, it can be assumed that the Women’s Caucus taught its views to the US delegation.

Similarly to the view of the US, rape was explicitly included in the suggested comments relating to the crime of genocide in the draft elements of crimes. Following the Women’s Caucus’ view, it is stated that

“the term ‘serious bodily or mental harm’ in Article 6(b) may include, but is not necessarily restricted to, acts of [...] rape [or] sexual violence [...]. It is recognized that rape and sexual violence may constitute genocide in the same way as any other act, provided that the criteria of the crime of genocide are met.”<sup>1040</sup>

The Women’s Caucus saw that state delegations were divided about how to define rape and became more open to a wording similar to how the crime was eventually defined.<sup>1041</sup> Contrary to the US definition of rape, the Caucus<sup>1042</sup> and Costa Rica<sup>1043</sup> put

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<sup>1038</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (War Crimes) (n 1035).

<sup>1039</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1040</sup> PrepCom2 ‘Proceedings of the Preparatory Commission at its First Session (16–26 February 1999)’ (02 March 1999) PCNICC/1999/L.3/Rev.1 art 6.

<sup>1041</sup> Interview 19 (n 483).

The Women’s Caucus’ starting point was advocating for a gender-neutral, perpetrator-orientated, invasion- and coercion-based understandings of rape as a crime in and of itself as well as potentially amounting to other crimes.

forward a definition emphasising invasion – including but not limited to penetration – and coercion rather than penetration and force.<sup>1044</sup> This definition is in accordance with the Caucus’ underlying working assumption that the definition of rape should not focus on body parts.<sup>1045</sup> Taking into consideration national and international rules, the definition proposed by the Women’s Caucus and Costa Rica goes beyond national and customary definitions<sup>1046</sup> and melds the principles that underlay the decisions in *Prosecutor v Jean-Paul Akayesu* and *Prosecutor v Anto Furundžija*.<sup>1047</sup> This way, it could have been aimed at mediating between actors who did not agree with the *ad hoc* tribunals’ findings.<sup>1048</sup>

Regarding the element of force or coercion, the Women’s Caucus argued that the term ‘coercion’ is preferable to that of ‘force’ because it expresses less direct but no less threatening situations. Referring to international norms in the form of approaches taken by the ICTY and ICTR, the Caucus reasoned that this terminology recognises that in conflict situations, a perpetrator may accomplish rape without directly coercing or threatening the person. In addition to acts or threats of force and situations where the victim is disabled, the description of coercive circumstances should also include, for example, “threats to deny or promises to provide the means of survival”<sup>1049</sup>. This addition is critical “if situations are to be included where women ‘choose’ to trade sexual service in order to survive, such as forced temporary marriage and other slave-like conditions”.<sup>1050</sup> In regard to the element of consent brought up by the USA in its explanation of ‘committed by force’, the Women’s Caucus disagreed, stating that

“[o]nce coercive circumstances or conditions have been shown, any discussion of the presence or lack of overt physical resistance or nonconsent on the part of the victim becomes an absurdity. [...] The traditional requirement in domestic rape laws that in addition to a showing of force, the prosecution had to show resistance or non-consent (or the treatment of these as essential to the proof of force) is both inappropriate to the situations before the ICC and based on the

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<sup>1042</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1043</sup> PrepCom2 ‘Proposal Submitted by Costa Rica on Elements of Crimes’ (n 433).

<sup>1044</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1045</sup> Interview 5 (n 735).

<sup>1046</sup> Interview 10 (n 432).

<sup>1047</sup> Interview 19 (n 483): State delegates at the ICC negotiations had heard of these cases but had not studied their gender aspects. Therefore, the Women’s Caucus “educated” state delegates about them.

<sup>1048</sup> Interview 18 (n 5).

<sup>1049</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1050</sup> *ibid.*

outrageous and now-repudiated sex-stereotyped attitudes about women and sex. [...] The resistance and non-consent standards played a big role in both allowing impunity for rape and other sexual violence committed against women as well as deterring women from participation in the legal system to vindicate themselves. Such standards served to shift the focus from the acts or conduct of the perpetrator to the ascribed failings of the victim”.<sup>1051</sup>

#### 7.2.4.2 Second session, July/August 1999

As indicated by the different proposals submitted by the US,<sup>1052</sup> Costa Rica<sup>1053</sup> and the Women’s Caucus<sup>1054</sup> in the first PrepCom2 session, one of the most contentious issues during the second PrepCom2 session in July/August 1999 was the definition of crimes of sexualised violence, especially of rape and the meaning of ‘penetration’.<sup>1055</sup>

The discussion was based on the very detailed text prepared by the ICRC on Article 8(2)(b), 8(2)(c) and 8(2)(e) of the ICC statute. The text was introduced at the request of the governments of Belgium, Costa Rica, Finland, Hungary, Korea, South Africa and Switzerland,<sup>1056</sup> demonstrating that the ICRC, like the Women’s Caucus, succeeded in teaching its views to states. The document contains research on, and an analysis of, International Humanitarian Law and Human Rights instruments and relevant national and international case law.<sup>1057</sup> Drawing on international rules identified in the *Akayesu* and *Furundžija* cases and the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, the material element of rape is defined as:

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<sup>1051</sup> *ibid.*

<sup>1052</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (Crimes against Humanity) (n 1035) art 7(1)(g)(1)(2), art 7(1)(g)(1)(3); PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (War Crimes) (n 1035) art 8(2)(b)(xxii)(1)(3), art 8(2)(b)(xxii)(1)(4), art 8(2)(e)(vi)(1).

<sup>1053</sup> PrepCom2 ‘Proposal Submitted by Costa Rica on Elements of Crimes’ (n 433).

<sup>1054</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1055</sup> Nikola Gillhoff and Matthias Neuner, ‘Some Observations on the Second Preparatory Commission: A NGO’s Perspective’ <<http://www.iccnw.org/documents/ICLSObserve2ndPrepComNov99.pdf>> accessed 22 January 2014.

<sup>1056</sup> PrepCom2 ‘Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland Regarding the Text Prepared by the International Committee of the Red Cross on Article 8, Paragraph 2 (b), (c) and (e) of the Rome Statute of the International Criminal Court’ (17 July 1999) UN Doc PCNICC/1999/WGEC/INF.2.

<sup>1057</sup> Dörmann, ‘War Crimes under the Rome Statute of the International Criminal Court’ (n 49) 351.

“(1) The perpetrator committed an act of sexual penetration, however slight:  
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or  
(b) of the mouth of the victim by the penis of the perpetrator;  
(2) by coercion or force or threat of force against the victim or a third person.”<sup>1058</sup>

The same wording is brought forward in a proposal by Costa Rica, Hungary and Switzerland.<sup>1059</sup> This was to be expected as this proposal is also based on ICRC research.<sup>1060</sup> As the suggested wording was not gender-neutral, a majority of delegations was not satisfied with it. A proposal by Colombia commenting on the proposal by Costa Rica, Hungary and Switzerland reflects this concern by replacing the term ‘penetration’ with having “sexual access to the victim”, intended to lower the threshold for protection.<sup>1061</sup> The background to this proposal highlights that delegates and lawyers relied on what they knew best and consequently the importance of national rules as well as the temporal and local contexts. However, delegates were also constantly reminded by the chair of the PrepCom2 not to simply reinstate their national positions but to define the crime for the purpose of the ICC statute.<sup>1062</sup> The Colombian proposal was informed by Colombia’s national criminal law at that time and the crime of carnal access which included, amongst others, rape. Even though there was no definition, rape was understood as penetration by the penis.<sup>1063</sup> Colombia’s proposal also contributed to the discussion of the element of force/coercion by stating that “[t]he agent commits the act through violence or the use of coercion or force or intimidation or the threat of force against the victim or a third person.”<sup>1064</sup> Eventually, the discussion paper proposed by the Coordinator of the

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<sup>1058</sup> PrepCom2 ‘Request from the Governments’ (n 1056).

<sup>1059</sup> PrepCom2 ‘Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)’ (19 July 1999) UN Doc PCNICC/1999/WGEC/DP.8.

<sup>1060</sup> Interview 12 (n 743); Interview 13 (n 2); Interview 15 (n 731).

<sup>1061</sup> PrepCom2 ‘Proposal Submitted by Colombia: Comments on the Proposal by the Delegations of Costa Rica, Hungary and Switzerland Concerning Article 8, Paragraph 2(b) of the Rome Statute (PCNICC/1999/WGEC/DP.8)’ (29 July 1999) UN Doc PCNICC/1999/WGEC/DP.16.

<sup>1062</sup> Interview 18 (n 5).

<sup>1063</sup> Interview 2 (n 467); Interview 7 (n 467).

<sup>1064</sup> PrepCom2 ‘Proposal Submitted by Colombia: Comments on the Proposal by the Delegations of Costa Rica, Hungary and Switzerland Concerning Article 8, Paragraph 2(b) of the Rome Statute (PCNICC/1999/WGEC/DP.8)’ (n 1061).

Working Group on Elements of Crimes, Herman von Hebel, defines rape as a war crime in international conflict that violates a person's autonomy<sup>1065</sup> as

“[t]he accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”<sup>1066</sup>

A footnote indicates that the “concept of ‘invasion’ is intended to be broad enough to be gender-neutral.”<sup>1067</sup> This can also be inferred from the second part of this element. In stating that “the anal or genital opening of the victim” would have to be invaded by any object or body part, it illustrates that men and women are recognised as victims and perpetrators of rape. Therefore, in addition to reflecting different national legislations and international jurisprudence,<sup>1068</sup> this definition merges proposals made by state and non-state delegations. It includes the notion of ‘penetration’ as advanced by Colombia<sup>1069</sup> and the US,<sup>1070</sup> as well as Belgium and others,<sup>1071</sup> and Costa Rica, Hungary and Switzerland<sup>1072</sup> on behalf of the ICRC.<sup>1073</sup> It also includes ‘invasion’ as advocated for by Costa Rica<sup>1074</sup> and the Women's Caucus.<sup>1075</sup> Also following the Women's Caucus view,<sup>1076</sup> the definition

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<sup>1065</sup> Boot (n 40) 210.

<sup>1066</sup> PrepCom2 ‘Discussion Paper Proposed by the Coordinator: Article 8, paragraph 2(b)(xxii)’ (10 August 1999) UN Doc PCNICC/1999/WGEC/RT.6 art 8(2)(b)(xxii)(1)(2); PrepCom2 ‘Proceedings of the Preparatory Commission at its Second Session (26 July–13 August 1999)’ (18 August 1999) UN Doc PCNICC/1999/L.4/Rev.1 art 8(2)(b)(xxii)(1)(2).

<sup>1067</sup> PrepCom2 ‘Discussion Paper Proposed by the Coordinator: Article 8, paragraph 2(b)(xxii)’ (n 1200) fn 1; PrepCom2 ‘Proceedings of the Preparatory Commission at its Second Session’ (n 1066) fn 1.

<sup>1068</sup> Wilmschurst, ‘ICC: PrepCom. 16 – 26 February 1999’ (n 778); La Haye (n 49) 189.

<sup>1069</sup> PrepCom2 ‘Comments by Colombia on the Elements of Crimes of Article 7 in Document PCNICC/1999/L.5/Rev.1/Add.2’ (01 March 2000) UN Doc PCNICC/2000/WGEC/DP.2 art 7(1)(g)(1); PrepCom2 ‘Comments by Colombia Regarding the Elements of Crimes of Article 8 (2) (b), 8 (2) (c) and 8 (2) (e) in Document PCNICC/1999/L.5/Rev.1/Add.2’ (08 March 2000) UN Doc PCNICC/2000/WGEC/DP.4 art 8(2)(b)(xxii)(1), art 8(2)(e)(vi)(1).

<sup>1070</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (War Crimes) (n 1035).

<sup>1071</sup> PrepCom2 ‘Request from the Governments’ (n 1056).

<sup>1072</sup> PrepCom2 ‘Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)’ (n 1059).

<sup>1073</sup> Interview 12 (n 743); Interview 13 (n 2); Interview 15 (n 731); PrepCom2 ‘Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)’ (n 1059).

<sup>1074</sup> PrepCom2 ‘Proposal Submitted by Costa Rica on Elements of Crimes’ (n 433).

<sup>1075</sup> Women's Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

of rape proposed in the coordinator's discussion paper is less dependent on body parts than the definition previously suggested by the ICRC.<sup>1077</sup> It takes the *Akayesu* language and tries to fit it into the discussion of legality.<sup>1078</sup>

The coordinator's discussion paper continued to specify that

“[t]he invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.<sup>1079</sup>

The intention of the drafters to stress that coercive circumstances are not restricted to the use of physical force becomes clear.<sup>1080</sup>

Focusing on the first element of the definition of rape, as indicated above, the expression of ‘invasion resulting in penetration’ reflects the importance of international as well as national rules. Drawing on the *Akayesu* definition of rape, a majority of delegations supported the concept of invasion which, even though it was seen as somewhat vague, was perceived to be broader than ‘penetration’ and intended to be gender-neutral.<sup>1081</sup> Most national definitions, in contrast, define rape using the concept of penetration. Highlighting the relevance of both international and national rules, the wording is a compromise reached between defining rape as an act of invasion or penetration.<sup>1082</sup> This compromise shows that while the ICC negotiations heavily relied on precedents and therefore could be characterised as male, precedents were chosen and interpreted in the light of new contexts, reflecting female reasoning. International and national “rules [left] room for the new insights and perspectives generated by new contexts”.<sup>1083</sup> The definition of rape as an

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<sup>1076</sup> Interview 5 (n 735).

<sup>1077</sup> PrepCom2 ‘Request from the Governments’ (n 1056).

<sup>1078</sup> Interview 19 (n 483).

<sup>1079</sup> PrepCom2 ‘Discussion Paper Proposed by the Coordinator: Article 8, paragraph 2(b)(xxii)’ (n 1066) art 8(2)(b)(xxii)(1)(3); PrepCom2 ‘Proceedings of the Preparatory Commission at its Second Session’ (n 1066) art 8(2)(b)(xxii)(1)(3).

<sup>1080</sup> La Haye (n 49) 189.

<sup>1081</sup> Interview 2 (n 467); Interview 11 (n 733); Interview 19 (n 483).

<sup>1082</sup> Interview 2 (n 467); Interview 8 (n 744); Interview 9 (n 430); Interview 12 (n 743); Interview 15 (n 731); Interview 16 (n 747); Cottier (n 41) 438; Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (n 49) 327; Dörmann, ‘War Crimes under the Rome Statute of the International Criminal Court’ (n 49) 391; La Haye (n 49) 188.

<sup>1083</sup> Bartlett (n 120) 852-853.

‘invasion resulting in penetration’ reflects the smallest common denominator between sometimes extremely diverging views.<sup>1084</sup> It reflects the delegates’ desire to ensure a high level of ratifications.<sup>1085</sup> The long and relatively complicated wording resulted out of the PrepCom2’s intention to draft a gender-neutral and inclusive definition.<sup>1086</sup> It is argued that the ICC formulation is one of the most progressive and broad definitions of rape under international and national law. Moving beyond international precedents, it aimed and succeeded at including many acts such as rape with objects which no judgment had yet been passed on by the *ad hoc* tribunals. Therefore, the ICC rape definition was negotiated for the future. It sets new standards, creating a normative force that promotes women’s rights in international but also domestic contexts through the need for implementation.<sup>1087</sup>

Even though this shows that the ICC definition of rape can be seen as a positive development and progress in International Criminal Law, it is not faultless. It simultaneously indicates progress and regression. It is argued that this definition is generic.<sup>1088</sup> However, it still includes body parts. It is still based on, and reproduces, outdated notions of honour<sup>1089</sup> by including the concept of penetration, making it a conservative<sup>1090</sup> definition. Therefore, it is not an entirely satisfactory compromise from a feminist point of view. In addition to its long and relatively complicated<sup>1091</sup> wording, the formulation ‘invasion resulting in penetration’ is somewhat awkward.<sup>1092</sup> A point could be made that this wording did not only result out of the drafters’ intention to create a gender-neutral definition, but also out of fear of misunderstandings of terms which necessitated a high degree of specification,<sup>1093</sup> or out of fear of alienating support by being too radical by developing a fundamentally new rape definition. Furthermore, it can be argued that a

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<sup>1084</sup> Interview 2 (n 467); Interview 8 (n 744).

<sup>1085</sup> Interview 13 (n 2).

<sup>1086</sup> Interview 2 (n 467); Interview 8 (n 744); Interview 12 (n 743); Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (n 49) 327; Spees, ‘Women’s Advocacy in the Creation of the International Criminal Court’ (n 792) 1238.

<sup>1087</sup> Interview 2 (n 467); Interview 8 (n 744); Interview 12 (n 743).

<sup>1088</sup> Interview 8 (n 744).

<sup>1089</sup> Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 778.

<sup>1090</sup> Interview 13 (n 2).

<sup>1091</sup> Cottier (n 41) 438.

<sup>1092</sup> Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 778.

<sup>1093</sup> Interview 11 (n 733).

gender-neutral definition could also have been included by adopting the definition developed by the ICTR in the *Akayesu* case, a definition only mentioning invasion. Even though it was argued that the formulation ‘invasion resulting in penetration’ broadens the ICC definition of rape, it could also be said, as mentioned above, that the *Akayesu* definition is even broader.

#### 7.2.4.3 Third session, November/December 1999

Based on a joint proposal by Canada and Germany<sup>1094</sup> that aimed at reflecting the most thoughtful approaches taken by the *ad hoc* tribunals,<sup>1095</sup> rape as a crime against humanity<sup>1096</sup> and as a war crime in international<sup>1097</sup> and internal armed conflict<sup>1098</sup> was defined in the same words used in the discussion paper proposed by the coordinator in the second PrepCom2 session.<sup>1099</sup>

Highlighting the controversy around the role of consent,<sup>1100</sup> the Arab block submitted a proposal stating that “[n]othing in [the elements of the crime against humanity of rape] shall affect natural and legal marital sexual relations in accordance with religious principles or cultural norms in different national laws.”<sup>1101</sup> If accepted, this would have made marital sexual intercourse consensual by definition. In contrast to national laws

<sup>1094</sup> PrepCom2 ‘Proposal Submitted by Canada and Germany on Article 7’ (23 November 1999) UN Doc PCNICC/1999/WGEC/DP.36; Elizabeth Wilmshurst, ‘ICC: PrepCom: 26 July – 13 August: Second Week’ (13 December 1999); Elizabeth Wilmshurst, ‘ICC: Preparatory Commission: 29 November – 17 December 1999’ (21 December 1999).

<sup>1095</sup> Interview 19 (n 483).

<sup>1096</sup> PrepCom2 ‘Addendum: Annex III: Elements of Crimes’ (22 December 1999) UN Doc PCNICC/1999/L.5/Rev.1/Add.2 art 7(1)(g)(1).

<sup>1097</sup> PrepCom2 ‘Addendum: Annex III: Elements of Crimes’ (22 December 1999) (n 1096) art 8(2)(b)(xxii)(1).

<sup>1098</sup> PrepCom2 ‘Addendum: Annex III: Elements of Crimes’ (22 December 1999) (n 1096) art 8(2)(e)(vi)(1); For further discussion of the Arab block and its proposal see Chapter 9.

<sup>1099</sup> PrepCom2 ‘Addendum: Annex III: Elements of Crimes’ (22 December 1999) (n 1096) art (7)(1)(g)(1)(4), art 8(2)(b)(xxii)(1)(3), art 8(2)(e)(vi)(1)(3); PrepCom2 ‘Discussion Paper Proposed by the Coordinator: Article 8, paragraph 2(b)(xxii)’ (n 1066) art 8(2)(b)(xxii)(1); PrepCom2 ‘Proposal Submitted by Canada and Germany on Article 7’ (n 1094) art (7)(1)(g)(1).

<sup>1100</sup> Boon (n 47) 639; Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for the Rules of Procedure and Evidence’ (December 1999) <<http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/icc/iccpc/11>> accessed 31 October 2013.

<sup>1101</sup> PrepCom2 ‘Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)’ (n 66) art 7(1)(g)(1)(4).



which at least partly view rape as an honour crime, the reference to cultural norms indicates an understanding of rape as a form of structural violence. The Arab block's wish to protect cultural norms that might allow marital rape makes clear that self-same norms underlie the perpetration of rape. The reference to national laws makes it clear that national norms and rules matter in international relations. Although this proposal was not supported, the Arab block's opposition resulted in Footnote 13 in the ICC Elements of Crimes, linking the elements of rape to the debate about an alternative wording for the introductory text to crimes against humanity.<sup>1102</sup> This underscores the fragile compromises repeatedly brokered by the Coordinator of the Working Group on the Elements of Crimes, Herman von Hebel, and Sub-Coordinator Prince Zeid Al-Hussein, as well as the German, Swiss, British and US delegations on the standards and definitions of sexualised crimes, potentially affecting the interpretation and application of these provisions.<sup>1103</sup>

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<sup>1102</sup> PrepCom2 'Addendum: Annex III: Elements of Crimes' (22 December 1999) (n 1096) art 7(1)(g)(1); Elizabeth Wilmshurst, 'ICC: PrepCom 12 – 30 June: Second Week' (26 June 2000); Wilmshurst, 'ICC: Preparatory Commission' (n 1094); Elizabeth Wilmshurst, 'ICC: PrepCom 13 – 31 March 2000: Report' (04 April 2000); Wilmshurst, 'ICC: PrepCom: 26 July – 13 August: Second Week' (n 1094); Pam Spees, 'Many Gender Issues Remain to be Resolved at the June Prepcom' *ICC Monitor* (New York, June 2000) 4; Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (n 3) 779-780; Pace and Schense, 'Coalition for the International Criminal Court at the Preparatory Commission' (n 34) 721-723; Darryl Robinson, 'The Context of Crimes against Humanity' in Roy S Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 66-69; The Arab block indicated that they would not discuss the elements of individual crimes against humanity until their concerns regarding the inclusion or exclusion of family matters under the ICC's jurisdiction were satisfactorily addressed. According to Darryl Robinson, the Arab block refined its position to the effect that "acquiescence in the long-standing cultural or religious norms concerning family matters" would not be sufficient to satisfy the policy element of the perpetration of crimes against humanity, seeking a more narrow exemption in the introductory text to crimes against humanity. However, this proposal still caused concerns about the appropriateness of cultural relativism. As a compromise, Paragraph 3 of the introductory text to the elements of crimes against humanity in the rolling text of December 1999 (PCNICC/1999/WGEC/RT.16), which defined an attack directed against a civilian population, specified that "[i]t is understood that a 'policy to commit such attack' requires that the State or organization actively promote or encourage such conduct as an attack against a civilian population." Only after reaching this compromise, the working group agreed on a rolling text regarding the elements of the individual crimes. Although this compromise initially received a great degree of support, when the working group discussed the elements of crimes against humanity again in the fifth session, it became clear that a majority of delegations favoured dropping or modifying this sentence. The sentence raised concerns that including an action requirement into the introductory text could restrict the development of law, that it would exclude situations of passive encouragement and that this provision would be interpreted as requiring proof of state action. Additionally, culture-based concerns were still voiced. The compromise draft text (PCNICC/2000/WGEC/L.1/Add.1) retains the final sentence but suggests a strict construction of the paragraph and adds an explanatory footnote that reads: "A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."

<sup>1103</sup> Wilmshurst, 'ICC: Preparatory Commission' (n 1094); Boon (n 47) 638-639; Hall, 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court' (n 3) 779.

While the Arab block primarily relied on its national laws as a basic position in the ICC negotiations, Colombia was taught by NGOs and eventually diverted from its national laws in the ICC discussions. In a comment on Rolling Text No. 6 proposed by the coordinator during the second PrepCom2 session, it recalled its previous proposal on the wording of the elements of the crime of rape and again suggested replacing the term ‘invasion (resulting in penetration)’ with ‘having access to’. The proposal’s reasoning was informed by discussions regarding a broadening of Colombia’s national definition of rape with national and international NGOs like the Colombian Commission of Jurists and the ICRC that had more access than the Colombian delegation to international doctrines and materials of the *ad hoc* tribunals.<sup>1104</sup> This highlights the importance of international norms and rules as well as the key role of NGOs in law-making processes. Colombia considered the definition worked out in the previous round of discussions to be “[extensive and] confusing and [...] not [to reflect] the protection which must exist in relation to the legally protected right of sexual freedom or freedom to exercise control over one’s body.”<sup>1105</sup> Drawing on the *Furundžija* case, it understood the proposed changes as gender-neutral and open, specifying the violent means used in a general way rather than referring to any body parts. Furthermore, using the main verb ‘access’ would make it possible to differentiate rape from sexual violence, the difference being that in the latter, the conduct would consist of the violent sexual act falling short of carnal access.<sup>1106</sup> This “would permit a better use of evidence and a significant development of jurisprudence”.<sup>1107</sup> Colombia spoke out against the use of ‘invasion’ because of its indefinite character and difficulties from an evidentiary point of view resulting out of this.<sup>1108</sup>

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<sup>1104</sup> Interview 2 (n 467); Interview 13 (n 2).

<sup>1105</sup> PrepCom2 ‘Comments by Colombia on Document PCNICC/1999/WGEC/RT.6 Proposed by the Coordinator’ (10 November 1999) UN Doc PCNICC/1999/WGEC/DP.30 1.

<sup>1106</sup> PrepCom2 ‘Proposal Submitted by Colombia: Comments on the Documents Submitted by Egypt (PCNICC/1999/WGEC/DP.42), Germany and Canada (PCNICC/1999/WGEC/DP.36), and Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and the United Arab Emirates (PCNICC/1999 WGEC/DP.39)’ (09 December 1999) UN Doc PCNICC/1999/WGEC/DP.43 2-3.

<sup>1107</sup> PrepCom2 ‘Comments by Colombia on Document PCNICC/1999/WGEC/RT.6 Proposed by the Coordinator’ (n 1105) 1.

<sup>1108</sup> Interview 2 (n 467).

#### 7.2.4.4 Fourth session, March 2000

In further discussions, NGOs explained to the Colombian delegation their understanding of ‘penetration’ as the use of any tool.<sup>1109</sup> Based on this, Colombia reverted from its previous suggestions and stated that the main verb ‘to have access to’ could be replaced by ‘to penetrate’ in order to facilitate agreement on the elements of rape as a crime against humanity and a war crime in (non-)international armed conflicts.<sup>1110</sup>

#### 7.2.4.5 Fifth session, June 2000

In the fifth PrepCom2 session, however, the delegations of Bolivia, Colombia, Chile, Cuba, Ecuador and Spain submitted a proposal suggesting anew to replace the verb ‘invasion’ with ‘to have access to’.<sup>1111</sup>

Eventually, however, the delegations wanted to ensure consistency between the elements of rape as a crime against humanity and the largely completed elements of rape as a war crime.<sup>1112</sup> Therefore, the definition of war rape remained as developed in the second PrepCom2 session<sup>1113</sup> and was adopted as such.<sup>1114</sup>

#### 7.2.5 Logics of interactions

As discussed in Chapter 2, actors’ identities, interests and actions are influenced by normative structures through different logics of interaction. In the ICC negotiations of the crime of war rape, actors’ identities, interests and actions were influenced mainly through

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<sup>1109</sup> *ibid.*

<sup>1110</sup> PrepCom2 ‘Comments by Colombia on the Elements of Crimes of Article 7 in Document PCNICC/1999/L.5/Rev.1/Add.2’ (n 1069) art 7(1)(g)(1); PrepCom2 ‘Comments by Colombia Regarding the Elements of Crimes of Article 8 (2) (b), 8 (2) (c) and 8 (2) (e) in Document PCNICC/1999/L.5/Rev.1/Add.2’ (n 1069) art 8(2)(b)(xxii)(1), art 8(2)(e)(vi)(1).

<sup>1111</sup> PrepCom2 ‘Proposals by Delegations of Bolivia, Colombia, Chile, Cuba, Ecuador, Spain...Regarding Crimes against Humanity in the Draft Elements of Crimes’ (30 June 2000) UN Doc PCNICC/2000/1.1/Rev.1/Add.2.

<sup>1112</sup> Jennifer Schense, ‘Draft Report on the Third Session of the Preparatory Commission, November 29-December 17, 1999, Coalition for an International Criminal Court’ (24 January 2000) <<http://www.iccnw.org/documents/3rdPrepComReportCICC.pdf>> accessed 23 January 2014.

<sup>1113</sup> PrepCom2 ‘Report of the Preparatory Commission’ (n 132).

<sup>1114</sup> Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 773.

the logic of consequences (instrumentalism), appropriateness (morality and ethics), practicality (practice), arguing (rational oppositional discourse) and purposive role playing.<sup>1115</sup> The Arab block submitted a proposal which, if accepted, would have made marital sexual intercourse consensual by definition. This can be interpreted to have been driven by the logic of consequences. It was in the Arab block's interest to protect their national laws, cultural norms and religious principles as well as members' sovereignty. The fact that many delegations felt that a separate listing of acts of sexualised violence was warranted rather than listing them as outrages upon personal dignity can be interpreted to have been driven by the logic of appropriateness as it was what social norms deemed right. In addition to listing sexualised crimes separately, they were also understood as potentially constituting, for example, acts of torture. This can be interpreted to have been driven by the logic of practicality. After acts of sexualised violence have been recognised as such in the jurisprudence of the ICTY and ICTR, delegates followed common sense and recognised that acts of sexualised violence could potentially constitute other crimes under the jurisdiction of the ICC. Driven by the logic of arguing, the ICC rape definition is a compromise reached between defining rape as an invasion or penetration. The ICRC's proposal to include as much as possible from the grave breaches provisions of the Geneva Conventions can be interpreted as having been driven by purposive role playing. As the guardian of International Humanitarian Law, it is the ICRC's task to protect it. In summary, the process and outcome of the ICC negotiations of the crime of war rape can be explained by actors upholding national normative structures as well as their concerns regarding national sovereignty, norms that were deemed right, common sense, reasonable arguments and the roles actors played in treaty negotiations.

#### *7.2.6 Conclusion on war rape*

Retracing who the key actors were in the ICC negotiations of rape (Research Question 1), it became apparent that the ICRC as well as the Women's Caucus were two international non-governmental delegations that drove the discussions of the crime of war

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<sup>1115</sup> Brunnée and Toope (n 138) 7.

rape, supporting Hypothesis 1.<sup>1116</sup> Regarding state delegations, the Arab block, Colombia and the US made relevant contributions.

The ICRC papers constituted the historical background for the definition of rape. It outlined the state of law at the time of the ICC negotiations. Procedurally, the ICRC could not introduce its papers as formal proposals due to its observer status. For this to happen, the papers needed to be taken up by state delegations. Here the ICRC's identity as the guardian and expert of International Humanitarian Law, and the respect of state delegations that the organisation enjoyed because of its successful influence in the emergence and evolution of International Humanitarian Law, was crucial. The ICRC looked for a number of states from different regions that would submit its texts.<sup>1117</sup> Of relevance to the discussion of the definition of rape are the ICRC papers that were taken up and submitted by Belgium and others<sup>1118</sup> as well as by Costa Rica, Hungary and Switzerland.<sup>1119</sup> The organisation also taught the Colombian delegation to broaden its national definition of rape that so far had guided Colombia's position on war rape in the ICC negotiations. Based on non-state actors' teaching of international doctrines and the *ad hoc* tribunals' judgments (Research Question 2),<sup>1120</sup> Colombia advanced a different reasoning for its proposed wording of the definition of rape.<sup>1121</sup> A proposal by New Zealand and Switzerland<sup>1122</sup> that was based on ICRC research<sup>1123</sup> was of relevance to the general inclusion of the crime in the ICC statute. Due to time constraints, the relationship between the ICRC and Switzerland was helpful. The Swiss government is the ICRC's main funder and until the 1970s, the committee controlling the organisation was closely linked

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<sup>1116</sup> Hypothesis 1 reads: NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

<sup>1117</sup> Interview 13 (n 2); International Committee of the Red Cross, 'Commentary: Definition of War Crimes' (n 978); International Committee of the Red Cross, 'Statement: Preparatory Committee on the Establishment of an International Criminal Court, New York, 1 to 12 December, 1997' (08 December 1997).

<sup>1118</sup> PrepCom2 'Request from the Governments' (n 1056).

<sup>1119</sup> PrepCom2 'Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)' (n 1059); PrepCom2 'Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2 (e) of the Rome Statute of the International Criminal Court, (v), (vi), (vii), (viii), (xi), (xii)' (29 July 1999) PCNICC/1999/WGEC/DP.11.

<sup>1120</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1121</sup> PrepCom2 'Comments by Colombia on Document PCNICC/1999/WGEC/RT.6 Proposed by the Coordinator' (n 1105) 1.

<sup>1122</sup> PrepCom 'Working Paper Submitted by the Delegations of New Zealand and Switzerland' (n 979).

<sup>1123</sup> International Committee of the Red Cross, 'Commentary: Definition of War Crimes' (n 978).

to the Swiss government.<sup>1124</sup> “Observers have alleged that the cultural, intellectual and political ‘symbiosis’ between the Swiss government and the ICRC leaders has influenced the ICRC’s positions and decisions.”<sup>1125</sup> Switzerland’s default policy in regard to the ICRC was to support the organisation if it could. New Zealand saw itself as gaining strength from being a good international actor. Thus, if a delegation looked for support, the state’s default position was to give support if the proposal made sense on a principled basis.<sup>1126</sup> Considering that the ICRC drew on existing national and international law as well as the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, Belgium and others, Colombia, and Costa Rica, Hungary and Switzerland proposed definitions of rape that used the term ‘penetration’ (Research Question 3).<sup>1127</sup>

In addition to the ICRC, the Women’s Caucus played a role in the development of the ICC definition of war rape. In contrast to the ICRC, however, the Caucus pushed for progress in the form of gender-neutral, perpetrator-orientated, invasion- and coercion-based understandings of rape as a crime in and of itself as well as potentially amounting to other crimes (Research Question 3).<sup>1128</sup> Like the ICRC, the Caucus’ positions were influenced by precedents from national and international laws (Research Question 2)<sup>1129</sup>. However, the Women’s Caucus was not bound by a role as guardian of International Humanitarian Law like the ICRC, but was guided by its mandate to advance women’s rights. Therefore it developed a different focus and advanced different conclusions. Its positions were (partly) taken up by the US<sup>1130</sup> and Costa Rica,<sup>1131</sup> confirming Hypothesis 1.<sup>1132</sup> Addressing Research Question 3,<sup>1133</sup> the US moved away from its initial consent-

<sup>1124</sup> J D Armstrong, ‘The International Committee of the Red Cross and Political Prisoners’ (1985) 39 *International Organization* 615; David P Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge University Press 2005) 201-241.

<sup>1125</sup> Yves Beigbeder, *The Role and Statutes of International Humanitarian Volunteers and Organizations: The Rights and Duty to Humanitarian Assistance* (Martinus Nijhoff Publishers 1999) 66.

<sup>1126</sup> Interview 18 (n 5).

<sup>1127</sup> Research Question 3 reads: What was the driving actors’ understanding of war rape and forced marriage?

<sup>1128</sup> Research Question 3 reads: What was the driving actors’ understanding of war rape and forced marriage?

<sup>1129</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1130</sup> PrepCom ‘For Annex to Statute: Elements Related to Article on Crimes against Humanity (Delegation of the United States)’ (n 974); PrepCom ‘For Annex to Statute: Elements Related to Article on Crimes against Humanity (Delegation of the United States)’ (n 975); PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (n 1036).

<sup>1131</sup> PrepCom2 ‘Proposal Submitted by Costa Rica on Elements of Crimes’ (n 433).

<sup>1132</sup> Hypothesis 1 reads: NGOs in general and women’s organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

based definition and advanced a broad understanding of the element of coercion. In addition, it developed gender-neutral definitions. However, in line with its national laws,<sup>1134</sup> it still used the term ‘penetration’ instead of ‘invasion’. In contrast to the proposals it submitted together with Hungary and Switzerland, Costa Rica on its own advanced a definition of rape using the term ‘invasion’. Considering that before the Women’s Caucus got involved in the ICC negotiations, state delegations mainly discussed the crime of rape in a victim-centred, honour-based way as constituting other crimes, for example an outrage upon personal dignity, and that initial definitions only used the term ‘penetration’ and included an element of consent as well as force, it can be argued that the Women’s Caucus taught its views to states.

Opposing these developments, the Arab block submitted a proposal<sup>1135</sup> that retains the definition of rape as ‘invasion resulting in penetration’. This went beyond its national laws which mainly use the term ‘penetration’. Falling back on national laws as well as religious principles and cultural norms, however, the Arab block aimed to include an exception that, if accepted, would have made sexual intercourse in marriage automatically consensual. The Arab block’s recourse to conservative national laws as well as religious principles and cultural norms to oppose progressive developments regarding the definition of rape confirming Hypothesis 2 that states with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of a more progressive definition. It also shows that domestic norms explain the resistance towards progressive definitions of rape. This speaks in favour of Hypothesis 3.<sup>1136</sup>

In addition to outlining who the driving actors were in the ICC negotiations of war rape as a specific sexualised crime listed in the Rome Statute, what influenced them in the discussion of the crime and how they defined it, the above discussion also argued that rape was understood as an honour crime as well as a form of structural violence. This confirms Hypothesis 5<sup>1137</sup> and speaks against Hypothesis 6.<sup>1138</sup> Initially, rape was included in the

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<sup>1133</sup> Research Question 3 reads: What was the driving actors’ understanding of war rape and forced marriage?

<sup>1134</sup> Rape, Abuse and Incest National Network, ‘The Laws in Your State’ <<https://www.rainn.org/public-policy/laws-in-your-state>> accessed 21 November 2014.

<sup>1135</sup> PrepCom2 ‘Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)’ (n 66).

<sup>1136</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

<sup>1137</sup> Hypothesis 5 reads: War rape and forced marriage were interpreted as honour crimes.

ILC draft statute as an outrage upon personal dignity. As this was perceived to be linked to notions of honour, rape was initially interpreted as an honour crime. This is also true for the Arab block's national understanding of rape that influenced its positions in the ICC negotiations. The Women's Caucus, in contrast, advocated an understanding of rape as a form of structural violence that has its roots in patriarchy.

### *7.3 Forced marriage*

After the second part of this chapter focused on war rape, the third part focuses on forced marriage in times of armed conflict. As part 7.2 on war rape, part 7.3 analyses which key actors drove the ICC negotiations of forced marriage specifically (Research Question 1), why they got involved in the discussion of this crime and what influenced their positions (Research Question 2) and how the driving actors interpreted forced marriage (Research Question 3). Seeing that forced marriage was only mentioned as a form of sexual slavery and not discussed as a crime in and of itself, it is of interest and relevance to trace the ICC negotiations of the crime of sexual slavery. It is necessary to understand how actors interpreted the crime of sexual slavery to learn why they categorised forced marriage as such, rather than as a separate crime.<sup>1139</sup>

As part 7.2 on war rape, part 7.3 on forced marriage analyses the relevant negotiations in the PrepCom, Rome Conference and PrepCom2.

#### *7.3.1 The Preparatory Committee on the Establishment of an International Criminal Court (PrepCom)*

In the context of the PrepCom negotiations, forced marriage was only mentioned in the fifth session. Therefore, this is the only PrepCom session analysed below.

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<sup>1138</sup> Hypothesis 6 reads: Structural causes of the perpetration of war rape and forced marriage were not addressed.

<sup>1139</sup> This will be discussed further in Chapter 8.



### 7.3.1.1 Fifth session, December 1997

Based on the Nuremberg charter,<sup>1140</sup> Control Council Law No. 10,<sup>1141</sup> the Tokyo charter,<sup>1142</sup> the statutes of the ICTY<sup>1143</sup> and ICTR,<sup>1144</sup> and the ILC Draft Code of Crimes,<sup>1145</sup> there was general agreement that the crimes against humanity provisions of the Rome Statute should include the crime of enslavement.<sup>1146</sup> This highlights the importance of international rules in the making of the ICC instruments. However, already in the Ad Hoc Committee, state delegations “recognized the need to reconcile differences in [the definition] and to further elaborate the specific content of [...] enslavement”.<sup>1147</sup> Encompassing not only slavery but also servitude and forced labour, enslavement can be

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<sup>1140</sup> London Agreement (n 283) art 6(c).

<sup>1141</sup> Allied Control Council Law No. 10 (n 282) art II(1)(c).

<sup>1142</sup> Charter of the International Military Tribunal for the Far East (n 300) art 5.

<sup>1143</sup> UNSC Resolution 827 (n 11) art 5(c).

<sup>1144</sup> UNSC Resolution 955 (n 11) art 3(c).

<sup>1145</sup> International Law Commission ‘Draft Code of Crimes against the Peace and Security of Mankind’ (n 944) art 18(d).

<sup>1146</sup> PrepCom ‘Decisions Taken by the Preparatory Committee at its Session from 11 to 21 February 1997’ (n 979); PrepCom ‘Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997’ (n 995); PrepCom ‘Draft Consolidated Text: War Crimes’ (n 979); PrepCom ‘Preliminary Text: War Crimes’ (n 979); PrepCom ‘Redraft of the ILC Article 20 on ICC Jurisdiction With Proposed Elements (Delegation of the United States)’ (n 971); PrepCom ‘Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands’ (n 1010) art 20(D)(I) Option II; Amnesty International, ‘Making the Right Choices’ (n 993) 29, 44; Hall, ‘Article 7 Crimes against Humanity para. 1 (c) Enslavement’ (n 541); Human Rights Watch, *Justice in Balance* (n 1000).

<sup>1147</sup> Ad Hoc Committee on the Establishment of an International Criminal Court (n 29) para 78.

PrepCom ‘For Annex to Statute: Elements Related to Article on Crimes against Humanity (Delegation of the United States)’ (n 974); PrepCom ‘Proposal by the United States of America on Elements of Offenses for the International Criminal Court’ (02 April 1998) UN Doc A/AC.249/1998/DP.11; PrepCom ‘Redraft of the ILC Article 20 on ICC Jurisdiction With Proposed Elements (Delegation of the United States)’ (n 971); PrepCom ‘Reference Paper Elements of Offenses for the International Criminal Court (Delegation of the United States)’ (n 1012): In a redraft of Article 20 of the ILC draft statute, the USA first defined the elements of enslavement as “the accused [holding] a person against that person’s will and for the purpose of performing labor”. In its draft elements of crimes of March 27, 1996, the US developed a definition of enslavement as “intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him”. In a reference paper dated March 27, 1998, the USA defined the elements of enslavement as “(1) [...] the accused intended to own or cause to be owned one or more persons and the fruits of their labor; (2) [...] one or more persons was forced to do labor without any compensation; (3) [...] the accused exerted ownership rights over one or more persons so as to deprive them of all individual rights”. The second wording was based on the 1926 Slavery Convention, demonstrating that international rules mattered in the ICC negotiations. It can be argued that the third definition developed by the US moves away from traditional understandings of slavery for the purpose of forced labour towards a broader definition, focusing on the acts of the perpetrator rather than on the purpose for which someone is enslaved. A similar focus is reintroduced in the USA’s fourth definition of enslavement put forward in another reference paper dated April 02, 1998. As outlined above, forced marriage in times of armed conflict includes elements of enslavement, slavery, serfdom and forced labour. Therefore, it can be understood as being indirectly included in the USA’s and other state delegations’ proposals. However, the prominence of traditional notions such as enslavement, slavery, serfdom and forced labour raises doubts as to whether actors involved in the ICC negotiations were aware of, and considered, the gendered elements of these crimes.

understood to be broad enough to include slavery-like practices such as “compulsory betrothal of women [...] where the victims are not merely economically exploited, but totally dependent on others”.<sup>1148</sup>

As outlined in section 7.2.2.3 of this chapter, in the fifth PrepCom session in December 1997, the Women’s Caucus proposed the inclusion of “rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other sexual and gender violence”<sup>1149</sup> in a sub-paragraph of the war crimes and crimes against humanity provisions.<sup>1150</sup> This makes the Rome Statute the first international legal instrument to specify sexual slavery as a war crime and a crime against humanity.<sup>1151</sup> The crime was explicitly included in the ICC statute without much debate. As the explicit inclusion of sexual slavery as a war crime and crime against humanity under the ICC instruments was based on Women’s Caucus’ advocacy, it is an example of an NGO teaching its views to states. Even though slavery was one of the earliest Human Rights violations to be recognised as a crime under International Law, it was only first regulated by treaty in 1926 when the Slavery Convention<sup>1152</sup> was adopted. Based on the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery<sup>1153</sup> was adopted in 1956. International rules evolved to address new forms of slavery including servitude and forced labour in the UDHR,<sup>1154</sup> the European Convention on Human Rights,<sup>1155</sup> the ICCPR,<sup>1156</sup> the American Convention on Human Rights<sup>1157</sup> and the African Charter.<sup>1158</sup> The explicit inclusion of sexual slavery in the Rome Statute was further facilitated by international norms related to the crime as discussed previously at the Vienna and Beijing conferences and also in reports of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like

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<sup>1148</sup> Hall, ‘Article 7 Crimes against Humanity para. 1 (c) Enslavement’ (n 541).

<sup>1149</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>1150</sup> Additionally, an informal working paper of 12 December 1997 included “slavery and the slave trade in all their forms” in Option II to section D of the war crimes provision.

<sup>1151</sup> La Haye (n 49) 190.

<sup>1152</sup> Slavery Convention (n 127).

<sup>1153</sup> Supplementary Slavery Convention (n 128).

<sup>1154</sup> UDHR (n 128) art 4.

<sup>1155</sup> ECHR (n 128) art 4(1).

<sup>1156</sup> ICCPR (n 99) art 8.

<sup>1157</sup> American Convention on Human Rights (n 128) art 6(1).

<sup>1158</sup> Banjul Charter (n 128) art 5.

Practices during Armed Conflict and the UN Special Rapporteur on Violence against Women, its Causes and Consequences.<sup>1159</sup> Reflecting customary law, the explicit inclusion of sexual slavery in the Rome Statute represents the codification of a specific kind of slavery that is increasingly recognised as a major problem worldwide. Its codification shows that the ICC negotiations could be characterised as male as they heavily relied on precedents. However, precedents were chosen and interpreted taking new contexts into consideration.<sup>1160</sup> This reflects female reasoning processes. Clearly linking the crime of sexual slavery to the well-recognised crime of enslavement, the inclusion of sexual slavery in the ICC instruments marks a shift away from an understanding of sexualised violence as an honour crime and refocused attention on the actions of the perpetrator.<sup>1161</sup>

The Women's Caucus understood sexual slavery to be a form of gender violence, which is structural violence.<sup>1162</sup> It gave "the enslavement of women through forced marriage or otherwise for domestic as well as sexual service"<sup>1163</sup> as one example. Irrespective of an initial agreement or some kind of exchange,

"[s]lavery and enslavement are the exercise of control over another person as chattel. Kidnapping, deceiving or coercing a woman, under threat of death, bodily injury, starvation to herself or others, to submit to serial rape as 'comfort women' or to be 'temporary wives,' providing both sexual and domestic services is, in the terms of article 1(1) of the 1926 Slavery Convention, placing her in 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' It may also qualify as a condition of 'serfdom' under article 1(b) of the Supplementary Convention on the Abolition of Slavery."<sup>1164</sup>

Referring to international rules,<sup>1165</sup> this elaboration gives examples of how a woman might enter into slavery as well as of possible forms of coercion, of how powers attaching to the right of ownership might be exercised over her. Contrary to the Women's Caucus' later

<sup>1159</sup> Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 615.

<sup>1160</sup> Bartlett (n 120) 852-853.

<sup>1161</sup> Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 608-609; Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1162</sup> See Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1163</sup> *ibid.*

<sup>1164</sup> *ibid.*

<sup>1165</sup> Brunnée and Toope (n 138): The Women's Caucus' reliance on international rules to define slavery and enslavement can be interpreted to have been driven by the logic of practicality. The Caucus followed common sense in defining the crimes in accordance with existing definitions.

view that the term ‘coercion’ is preferable to ‘force’ as it more clearly includes less direct or threatening situations,<sup>1166</sup> the elaboration only lists physical forms of coercion, most of them directed at the victim.

The Women’s Caucus’ elaboration on enslavement and slavery explicitly include forced marriage in times of armed conflict where women are abducted and made fighters’ wives. Under threat of death and bodily injury they are forced to provide sexual and domestic services to their forced husbands. According to the Caucus, this way, rights of ownership are exercised over forced wives. As forced wives are bound to live and work on land that belongs to their forced husbands or the fighting group, forced to serve their husband sexually and otherwise and are not free to change their situation, forced marriage could also qualify as a condition of serfdom.<sup>1167</sup>

The Women’s Caucus proposed to include “all forms of enslavement, including sexual or domestic enslavement and forced marriage, by sale, deception, coercion or threat”<sup>1168</sup> in the war crimes provisions of the Rome Statute that cover grave breaches of the Geneva Conventions. In contrast to the above elaboration on sexual slavery, this definition is gender-neutral. It simultaneously broadens and limits ways a person can be obtained by leaving out any reference to kidnapping but including sale and threat. Regarding the criminalisation of forced marriage under the ICC instruments, this change is rather unfortunate as most forced wives are abducted into forced marriage. Therefore, a direct reference to kidnapping in the definition of enslavement would have made the link between the crimes clearer. However, this is ensured by the direct inclusion of forced marriage into the definition of enslavement.

Contrary to these efforts led by the Women’s Caucus, the Holy See<sup>1169</sup> submitted a proposal deleting the reference to sexual slavery, enforced prostitution and enforced pregnancy from the list of sexualised crimes. It was replaced with a separate subsection

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<sup>1166</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1167</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>1168</sup> *ibid.*

<sup>1169</sup> Rothschild (n 34): The Holy See exercised considerable influence in international negotiations like the Beijing Conference and the ICC negotiations. It utilised its observer status with the UN to gain access to meetings, making the Holy See uniquely positioned to move resources including information and personnel across the physical and institutional divide between states and NGOs. The Holy See formed alliances with Latin American countries and conservative North American NGOs to counter certain developments in women’s rights. Like the Arab block, the Holy See’s rhetoric exploited moral universalism and national particularism alike, depending on its conversation partner.

listing “enslavement or any other kind of involuntary servitude that emerges from the theatre of war or armed conflict”<sup>1170</sup> as a war crime in international and internal conflicts. Eventually, the proposal was not adopted.<sup>1171</sup> Nevertheless, it sparked a heated debate between delegates of the Holy See and Bosnia and Herzegovina<sup>1172</sup> about the crime of forced pregnancy. The proposal also sparked questions regarding the difference between enslavement and sexual slavery. If sexual slavery would be a form of enslavement, the Holy See’s proposal would have reduced overlap.<sup>1173</sup>

“[A]rguments in favour of retaining the separate listings of the crimes of enslavement and sexual slavery [stressed] that sexual slavery is a prevalent contemporary crime warranting express recognition, that the prohibition was sufficiently established in existing law, that listing the crime increases the gender-sensitivity of the Rome Statute, and that sexual slavery is conceptually distinct from certain other forms of enslavement or slavery-like practices”.<sup>1174</sup>

Even though it becomes clear that the Holy See’s proposal was aimed at the crime of enforced pregnancy, at first glance, it could be viewed as being directed at the crime of sexual slavery. The retention of references to enslavement and involuntary servitude in the Holy See’s proposal, however, indicates that the proposal did not target sexual slavery and, by extension, forced marriage. This also becomes apparent when considering that medieval canonists already stressed the importance of mutual free consent to marriage for it to be valid. Based on this as well as on the Holy See’s role as a “[respected] international moral voice”,<sup>1175</sup> it would have had an interest in criminalising forced marriage. Since the emphasis on free consent to marriage is based on an understanding that it is related to a person’s dignity, the Holy See might understand forced marriage to be a violation of someone’s dignity<sup>1176</sup> and, by extension, an honour crime. In contrast to the critique voiced above in regard to the categorisation of rape as an outrage upon personal dignity, however,

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<sup>1170</sup> PrepCom2 ‘Proposal Submitted by the Holy See’ (09 December 1997) UN Doc A/AC.249/1997/WG.1/DP.12.

<sup>1171</sup> Interview 1 (n 730); Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 214.

See PrepCom2 ‘Proposal Submitted by Holy See, Article 5 [20] War Crimes, B (p bis)’ (01 April 1998) UN Doc A/AC.249/1998/DP.13: Here, the list of sexualised crimes includes sexual slavery.

<sup>1172</sup> Interview 4 (n 736); Wilmshurst, ‘ICC: PrepCom 13 – 31 March 2000’ (n 1102).

<sup>1173</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 622.

<sup>1174</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 622-623.

<sup>1175</sup> Interview 1 (n 730).

<sup>1176</sup> *ibid.*

the Holy See understood physical integrity, autonomy and self-determination to be based on someone's dignity.<sup>1177</sup> Following this, forced marriage as a violation of someone's dignity would also be a violation of a person's integrity and (sexual) autonomy. Focusing on the language of the Holy See's proposal, it suggests a broader wording than the list of sexualised crimes which would still include forced marriage. In contrast to an understanding of forced marriage as a form of sexual slavery, it does not focus on the crime's sexual elements. However, by subsuming it under enslavement and involuntary servitude, exactly these sexual elements would be eclipsed. Just as it is misleading to emphasise the sexual elements of forced marriage, it is misleading to downplay them. Consequently, the Holy See's proposal would not have contributed to a more informed understanding of the crime.

Outlining the discussions regarding the crime of sexual slavery in the fifth PrepCom session shows that the Women's Caucus explicitly mentioned forced marriage in times of armed conflict as a form of sexual slavery.<sup>1178</sup> Therefore, forced marriage can be interpreted to be indirectly included in the Rome Statute. However, it was not discussed in any depth. The Caucus also did not consider forced marriage as a specific act of sexualised violence independent of sexual slavery.<sup>1179</sup> Other questions such as the distinction between, and respective definition of, sexual slavery, enslavement, forced prostitution and human trafficking took priority over considerations of forced marriage and whether it indeed constitutes a form of sexual slavery.<sup>1180</sup>

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<sup>1177</sup> *ibid.*

<sup>1178</sup> See Chapter 8 for a detailed discussion of the Women's Caucus' understanding of forced marriage as a form of sexual slavery.

<sup>1179</sup> Interview 17 (n 5); Interview 18 (n 5); Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1180</sup> See PrepCom 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II' (n 960) 69; Boot (n 40) 213; Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 619-623; Women's Caucus for Gender Justice, 'Priority Concerns Related to the Elements Annex' (n 430); Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

### 7.3.2 *The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference)*

During plenary discussions in Rome, forced marriage was not mentioned. An article published in the fifth issue of *Terra Viva*, however, cites Conse A, who was abducted by the LRA, saying that “girls were forcefully married off to men who were cruel”.<sup>1181</sup>

The crime of sexual slavery was introduced by the United Nations Children’s Fund and Ugandan delegate Mr Kirabokyamaria in relation to children. Regarding the conflicts in Rwanda, the former Yugoslavia, Sierra Leone and Uganda, both actors referred to children facing “abduction, rape, enslavement”,<sup>1182</sup> “mutilation, forced pregnancy [and] sexual slavery”,<sup>1183</sup> all potential elements of a forced marriage in wartime. In an interview with *Terra Viva*, Eva Boenders, representative of the Children’s Caucus, emphasised that “child recruits may also be sexually abused and forced to live as sexual slaves to soldiers”.<sup>1184</sup> During the discussions in the Committee of the Whole, Mr von Hebel of the Netherlands mentioned that a compromise text of crimes against humanity explicitly including sexual slavery received wide support.<sup>1185</sup>

The official records of the Rome Conference show that the crime against humanity of enslavement was defined based on a proposal submitted by Italy<sup>1186</sup> as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and

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<sup>1181</sup> — — ‘UNICEF Eyes Higher Recruitment Age’ *Terra Viva* (Rome, 19 June 1998) 1-2.

<sup>1182</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ‘Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II’ (n 1015) 118; See also — — ‘Kids Murdered, Forced into Rebel Armies in Uganda’ *Terra Viva* (Rome, 15 June 1998) 12.

<sup>1183</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ‘Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II’ (n 1015) 112.

<sup>1184</sup> — — ‘Child Soldiering and Recruitment Attached’ *ICC Monitor* (New York, 16 June 1998) 2; See also — — ‘How to Protect Children With a Strong and Effective Court’ *ICC Monitor* (New York, 19 June 1998) 2.

<sup>1185</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ‘Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. II’ (n 1015) 268.

<sup>1186</sup> Interview 19 (n 483); Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 614: The loose coalition of state and non-state actors that supported the inclusion of sexual slavery in the Rome Statute supported whichever Coalition member spoke first to ensure a progressive definition of, and approach to, sexual slavery. While it was difficult to coordinate who spoke first, it influenced the actor’s power position in the ICC negotiations.

children”.<sup>1187</sup> In addition to being based on Article 1(1) of the Slavery Convention, this definition reflects the PrepCom debate regarding the overlapping circle of crimes and if it should be completed, linking the crimes of sexual slavery, enslavement and trafficking in persons.<sup>1188</sup>

Some delegations at the Rome Conference were aware of academic proposals for the elements of sexual slavery.<sup>1189</sup> M Cherif Bassiouni, for example, proposed the following elements for the crime of sexual bondage: “an institution or practice whereby a person is forcibly transferred or held for the purpose of performing any sexual conduct whatsoever, whether for reward or not.”<sup>1190</sup> Even though Kelly Dawn Askin did not include the crime of sexual slavery in her proposed definitions of sexualised crimes, her definition of forced prostitution was considered helpful in the discussions of the crime of sexual slavery. Askin proposed the following elements for the crime of enforced prostitution: “(a) [...] the accused unlawfully forced or coerced a certain named or described person to engage in sexual acts; and (b) As a result of the force or coercion, the person’s reproductive capacity was affected.”<sup>1191</sup>

### *7.3.3 The Preparatory Commission for the International Criminal Court (PrepCom2)*

Just as the PrepCom2 negotiations are crucial for an analysis of the process of defining war rape under the ICC instruments, they are of great importance when analysing the process of defining forced marriage as a form of sexual slavery as the PrepCom2 negotiations dealt with the question of how to define crimes. This sets them apart from previous discussions in the PrepCom and Rome Conference that focused on the categorisation of crimes as acts of genocide, crimes against humanity and war crimes. As in the second part of this chapter, the sections below cover the first five PrepCom2 sessions as the negotiations of the ICC Elements of Crime were completed in the fifth session.

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<sup>1187</sup> Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ‘Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. III, Rome, 15 June - 17 July 1998’ (2002) UN Doc A/CONF.183/13 (Vol. III) 95.

<sup>1188</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 628.

<sup>1189</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 628.

<sup>1190</sup> M Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Court* (Martinus Nijhoff Publishers 1987) 147.

<sup>1191</sup> Askin, *War Crimes against Women* (n 261) 396.



### 7.3.3.1 First session, February 1999

After the Rome Conference, the elements of the crime of sexual slavery, including some of the questions raised in the December 1997 PrepCom, were discussed at every session of the PrepCom2.

The USA proposed the elements of the crime against humanity and war crime of sexual slavery to be

“[t]hat the accused intended to attack one or more persons by causing them to engage in acts of a sexual nature. That the accused deprived one or more persons of their liberty. That the accused, through force or threat, caused the person or persons to engage in acts of a sexual nature”.<sup>1192</sup>

A comment to the article states that ‘deprivation of liberty’ is to be understood broadly to include physical detention and confinement as well as severe deprivations of autonomy and freedom of movement.<sup>1193</sup> This understanding resonates with the Women’s Caucus view regarding the element of force to include non-physical coercion.<sup>1194</sup> The USA’s definition of sexual slavery could include forced marriage in times of armed conflict as in most cases women are forced to engage in sexual acts. While some forced wives are confined, deprivation of autonomy and freedom of movement are characteristics of their everyday life.

Drawing on international normative structures in the form of statements of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict and the indictment in the *Foča* case as precedents, the Women’s Caucus brought forward a different definition comparable to that of the crime of enslavement. Describing the act of enslavement rather than the status or condition of the victim,<sup>1195</sup> the Caucus defined sexual slavery as “[t]he exercise of any or all of the powers attaching to the right of ownership or control when such exercise involves obtaining or

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<sup>1192</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (Crimes against Humanity) (n 1035) art 7(1)(g)(2)(1), art 7(1)(g)(2)(3); PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (War Crimes) (n 1035) art 8(2)(b)(xxii)(2), art 8(2)(e)(vi)(1)(2), art 8(2)(e)(vi)(1)(2)(3), art 8(2)(e)(vi)(1)(2)(4).

<sup>1193</sup> PrepCom2 ‘Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum’ (Crimes against Humanity) (n 1035).

<sup>1194</sup> Spees, ‘Women’s Advocacy in the Creation of the International Criminal Court’ (n 792) 1241.

<sup>1195</sup> Hall, ‘Article 7 Crimes against Humanity para. 1 (c) Enslavement’ (n 541).

imposing sexual service and/or access through rape or other forms of sexual violence.”<sup>1196</sup>  
Explicitly mentioning forced marriage, the Women’s Caucus elaborated that

“[s]exual slavery can be institutionalized as with the ‘comfort women’ organized by the Japanese Army during World War II or the rape camps in the former Yugoslavia; or it can be carried out on a more individualized basis. Thus, forced temporary marriage has been recognized as a form of sexual slavery. Sexual slavery embraces situations, such as in Rwanda, where women may be kidnapped or may choose this condition as a means of survival; where women may be physically confined to the home, or ‘free’ to leave the situation albeit at the risk of being killed because she leaves the protected ‘marriage’ status. The same is true of situations where the military occupies a town and demands sexual service from women in their own home.”<sup>1197</sup>

#### 7.3.3.2 *Second session, July/August 1999*

In the second PrepCom2 session, Costa Rica, Hungary and Switzerland<sup>1198</sup> proposed a different set of elements for the war crime of sexual slavery that was based on ICRC research.<sup>1199</sup> It was drafted to avoid the problem raised by the US proposal in regard to the term ‘attack’. Some delegations were concerned

“that this word was inappropriate and could set an unnecessarily high threshold for the Prosecutor to meet. Delegates also had problems with the US’s comment on ‘deprived’ and ‘deprivation’, which, by using the term ‘universally recognized as impermissible under international law’, could also wrongly set an unduly high threshold – one not normally seen (indeed, one expressly avoided) in international instruments.”<sup>1200</sup>

Costa Rica, Hungary and Switzerland defined sexual slavery as “[t]he perpetrator treat[ing] a person as chattel by exercising any or all of the powers attaching to the right of ownership, including sexual access through rape or other forms of sexual violence”.<sup>1201</sup>

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<sup>1196</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1197</sup> *ibid.*

<sup>1198</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 629.

<sup>1199</sup> Interview 12 (n 743); Interview 13 (n 2); Interview 15 (n 731).

<sup>1200</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 629.

<sup>1201</sup> PrepCom2 ‘Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)’ (n 1059).

The last subordinate clause is comparable to the definition of sexual slavery suggested by the Women's Caucus in the previous PrepCom2 session. As illustrated before, forced marriage in times of armed conflict could come under this definition. Drawing on the international rules of the 1926 Slavery Convention and the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, the same wording can also be found in the request from the governments of Belgium, Costa Rica, Finland, Hungary, Korea, South Africa and Switzerland regarding the text prepared by the ICRC on Article 8(2)(b), (c) and (e).<sup>1202</sup> The ICRC explicitly quoted the Special Rapporteur, who understood "situations where women and girls are forced into 'marriage', domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors"<sup>1203</sup> as examples of sexual slavery. Generally, the ICRC's proposal introduced by Belgium and others is closer to the Rome Statute's definition of enslavement.<sup>1204</sup> The first element set out the concept of slavery while the second element described the sexual aspect of slavery.<sup>1205</sup> However, many delegations felt that the reference to chattel was outdated, inappropriate and vague, linking the concept of sexual slavery to the ownership of saleable property and classic concepts of chattel slavery.<sup>1206</sup> To overcome these criticisms, Colombia proposed to define sexual slavery as "[t]he agent exercises any or all of the powers attaching to the right of ownership of a person in order to carry out sexual acts of any kind."<sup>1207</sup> In contrast to the proposal by the Women's Caucus<sup>1208</sup> and the delegations of Costa Rica, Hungary and

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<sup>1202</sup> PrepCom2 'Request from the Governments' (n 1056).

<sup>1203</sup> Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict as cited in PrepCom2 'Request from the Governments' (n 1056); United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3).

<sup>1204</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court (n 36) art 7(2)(c): "The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."

<sup>1205</sup> Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 630.

<sup>1206</sup> Roger S Clark, 'Crimes against Humanity and the Rome Statute of the International Criminal Court', in Guiseppe Nesi and Mauro Politi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate Publishing Co 2001) 75, 83; La Haye (n 49) 191; Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 629.

<sup>1207</sup> PrepCom2 'Proposal Submitted by Colombia: Comments on the Proposal by the Delegations of Costa Rica, Hungary and Switzerland Concerning Article 8, Paragraph 2(b) of the Rome Statute (PCNICC/1999/WGEC/DP.8)' (n 1061).

<sup>1208</sup> Women's Caucus for Gender Justice, 'Priority Concerns Related to the Elements Annex' (n 430).

Switzerland, the reference to “rape or other forms of sexual violence”<sup>1209</sup> is eliminated here. This “makes it possible to include [...] acts [of rape and other forms of sexualised violence as well as acts] [...] in which there is alleged or apparent consent of the victim when faced with intimidation or resignation resulting from his or her condition of slavery.”<sup>1210</sup> Mediating between state delegations, the Women’s Caucus developed a definition of sexual slavery that includes elements of the Costa Rican, Hungarian and Swiss definition as well as the definition proposed by Colombia. It covers situations where “[t]he perpetrator [...] [exercised] any or all of the powers attaching to the right of ownership, including sexual access through rape or other forms of sexual violence.”<sup>1211</sup> This way, it is consistent with the ICC’s definition of enslavement which emphasises the element of ownership. As illustrated in Chapter 5 and in the discussion above, all of the definitions referred to in this paragraph could include forced marriage in wartime.

Resonating with a previous elaboration on the crime of slavery and enslavement by the Women’s Caucus,<sup>1212</sup> the US suggested including an illustrative list of actions that qualify as the exercise of powers attaching to the right of ownership in the elements of the crime of sexual slavery. Similar to the USA’s insistence on attaching a document outlining the elements of crimes to the Rome Statute, this was motivated by the opinion that more precision was needed.<sup>1213</sup> Establishing a direct link between the accused and the purchase or sale and including a reference to labour without compensation, the USA’s proposal was criticised for potentially excluding indirect perpetrators and situations of slavery with compensation.<sup>1214</sup> Forced marriage in times of armed conflict, for example, is a crime where multiple perpetrators can play different roles including bringing, exposing and

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<sup>1209</sup> PrepCom2 ‘Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)’ (n 1059).

<sup>1210</sup> PrepCom2 ‘Proposal Submitted by Colombia: Comments on the Proposal by the Delegations of Costa Rica, Hungary and Switzerland Concerning Article 8, Paragraph 2(b) of the Rome Statute (PCNICC/1999/WGEC/DP.8)’ (n 1061).

<sup>1211</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for the Elements Annex’ (n 435).

<sup>1212</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>1213</sup> Interview 12 (n 743); Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (n 49) 328; Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 781; Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 631.

<sup>1214</sup> Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 781; Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 631.

accepting a woman for the purpose of forced marriage. The material support a forced wife receives from her forced husband could arguably be understood as a form of compensation.

The outcome of the discussions of the elements of the crime of sexual slavery was a rolling text that eliminated the reference to chattel, kept the ICC's definition of enslavement, included an open list of examples of how the right of ownership might be exercised and established a specific connection to the sexual aspect of slavery.<sup>1215</sup> It states that

“[t]he accused exercised a power attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty [and] [t]he accused caused such a person or persons to engage in one or more acts of a sexual nature”.<sup>1216</sup>

Other examples such as recruiting or abducting that would have been particularly relevant for the crime of forced marriage were not included because they were understood to define the means of obtaining a person and not to describe directly an exercise of ownership.<sup>1217</sup> Nevertheless, forced marriage in wartime could fall within this definition if ‘a similar deprivation of liberty’ is interpreted so as to include abduction, a forced exclusive sexual and non-sexual relationship, forced pregnancy, forced childbearing and upbringing, and forced labour.

The wording of the definition of sexual slavery included in the rolling text is very different from the various proposals previously submitted. The first subordinate clause was taken from the 1926 Slavery Convention. The second subordinate clause reflects the USA's concerns regarding an illustrative list of how powers attaching to the right of ownership could be exercised. Of this list, only selling overlaps with a previous definition suggested by the Women's Caucus.<sup>1218</sup> Similarly to the Caucus' definition, the one included in the rolling text includes pecuniary as well as non-pecuniary elements. The Women's Caucus' definition, however, focused on ways of obtaining a person while the definition in the rolling text gives examples of the exercise of powers attaching to the right

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<sup>1215</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 632.

<sup>1216</sup> PrepCom2 ‘Discussion Paper Proposed by the Coordinator: Article 8, paragraph 2(b)(xxii)’ (n 1066); PrepCom2 ‘Proceedings of the Preparatory Commission at its Second Session’ (n 1066) art 8(2)(b)(xxii)(2).

<sup>1217</sup> La Haye (n 49) 191.

<sup>1218</sup> Women's Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

of ownership after a person has been obtained. The term ‘similar deprivation of liberty’ on the one hand resonates with the *Foča* indictment and the Women’s Caucus’ proposal to include physical and psychological forms of confinement.<sup>1219</sup> On the other hand, it can be limiting as the discussion of the fourth PrepCom2 session below shows. The whole first element of the definition in the rolling text is the same as that of the crime of enslavement as defined in the ICC Elements of Crimes.<sup>1220</sup>

### 7.3.3.3 Third session, November/December 1999

The discussions of the November/December 1999 PrepCom2 session reviewed questions regarding the illustrative list of ways in which rights of ownership might be exercised; its inclusion, exclusion, scope and (commercial) focus.<sup>1221</sup> Colombia, Switzerland, the US and the Women’s Caucus participated in these discussions and considered the Supplementary Slavery Convention and the *Foča* indictment.<sup>1222</sup> Eventually, this debate on the elements of the crime of sexual slavery was overtaken by the wider discussions on an overall compromise package on the elements of crimes against humanity<sup>1223</sup> and the August 1999 rolling text remained unchanged.<sup>1224</sup>

Early in the December 1999 negotiations, the Arab block proposed that the elements of sexual slavery should stipulate that “[p]owers attaching to the right of

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<sup>1219</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).

<sup>1220</sup> PrepCom2 ‘Report of the Preparatory Commission’ (n 132) art 7(1)(c)(1).

<sup>1221</sup> PrepCom2 ‘Proposal Submitted by Colombia: Comments on the Documents Submitted by Egypt (PCNICC/1999/WGEC/DP.42), Germany and Canada (PCNICC/1999/WGEC/DP.36), and Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and the United Arab Emirates (PCNICC/1999 WGEC/DP.39)’ (n 1106); PrepCom2 ‘Proposal Submitted by Columbia: Comments on the Proposals Submitted by Canada and Germany on Article 7 and by Japan on the “Structure” of Elements for Crimes against Humanity’ (06 December 1999) UN Doc PCNICC/1999/WGEC/DP.41; Clark (n 1343) 83; Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 632.

<sup>1222</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 632.

<sup>1223</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 633-634.

<sup>1224</sup> PrepCom2 ‘Addendum: Annex III: Elements of Crimes’ (22 December 1999) (n 1096) art 7(1)(g)(2), art 8(2)(b)(xxii)(2), art 8(2)(e)(vi)(2); PrepCom2 ‘Addendum: Annex III: Elements of Crimes’ (07 April 2000) UN Doc PCNICC/2000/L.1/Rev.1/Add.2 art 7(1)(g)(2), art 8(2)(b)(xxii)(2), art 8(2)(e)(vi)(2); PrepCom2 ‘Delegation of Samoa: Some Suggestions on how the Elements of Genocide and Crimes against Humanity might be Re-Worked in the Light of Paragraphs 5 and 6 of the Report of the Informal Intel-sessional Meeting in Siracusa, 31 January-6 February 2000’ (13 March 2000) <<http://www.legal-tools.org/doc/addd3b/>> accessed 07 February 2014; PrepCom2 ‘Proposal Submitted by Canada and Germany on Article 7’ (n 1094) art 7(1)(g)(2).

ownership do not include rights, duties and obligations incident to marriage between a man and a woman”.<sup>1225</sup> The Arab block prioritised the protection of religious or cultural practices and traditions. As mentioned above, the reference to (patriarchal) cultural norms indicates an understanding of sexual slavery as a form of structural violence. The Arab block “feared that the law on crimes against humanity was too ambiguous and might be used by activist judges not simply to deal with atrocities but as a tool of ‘social engineering’”.<sup>1226</sup> The Arab block was concerned that the elements might be drafted so wide as to criminalise certain domestic practices as crimes against humanity.<sup>1227</sup> However, as crimes against humanity are intended to be universal and fall within Human Rights and International Criminal Law, most delegations could not accept such culturally specific exemptions and were concerned about setting a precedent that could have an adverse impact in the Human Rights field.<sup>1228</sup> The inclusion of culturally specific exceptions, for example, might have led to the (discussion about the) inclusion of penalties recognised under Shari’a law such as the death penalty.<sup>1229</sup> Since it would have also conflicted with values and norms regarding the separation of Church and State, a point was made by dissenting delegations that religious values should not shape the law.<sup>1230</sup> Moreover, the inclusion of these exceptions might have appeared to be an international endorsement of such situations. Accepting the Arab block’s proposal would have resulted in approving acts that violate values and norms most delegations at the ICC negotiations shared. These delegations would not allow the Arab states’ proposal as it would permit people to do something immoral. Moreover, as a practical matter, the exceptions requested were hardly necessary. Although far from acceptable for some delegations, they would hardly qualify as a widespread or systematic attack against a civilian population. In a situation of widespread violence amounting to crimes against humanity, however, the blanket

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<sup>1225</sup> PrepCom2 ‘Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)’ (n 66); See Chapter 9 for a detailed discussion of the Arab block’s proposal.

<sup>1226</sup> Robinson (n 1102) 65.

<sup>1227</sup> Interview 18 (n 5).

Interview 11 (n 733): It was also suggested by other delegates that the Arab block’s proposal regarding the crime of sexual slavery targeted gay marriage rather than aiming at excluding marriage relations from powers attaching to the right of ownership.

<sup>1228</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 636-637; Robinson (n 1102) 65-66.

<sup>1229</sup> Interview 1 (n 730); Interview 3 (n 726).

<sup>1230</sup> Interview 2 (n 467).

exclusion of all family matters would result in impunity for crimes committed against family members.<sup>1231</sup> The Women's Caucus stressed that the proposal's content discriminates against women by trying to exclude crimes which affect women disproportionately from the ICC's jurisdiction. Therefore, the adoption of the Arab block's proposal would violate International Law.<sup>1232</sup> The Caucus drew on international norms in the form of the statements of the CEDAW and the Vienna Declaration and Programme of Action, and referred to Article 4 of the DEVAW which affirms that "[s]tates should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination".<sup>1233</sup> Consequently, the Arab block's proposal was dismissed.

#### *7.3.3.4 Fourth session, March 2000*

The fourth PrepCom2 session continued to discuss questions regarding the illustrative list of ways in which rights of ownership might be exercised. Colombia proposed to explicitly include "transferring [...] [and] trafficking" and to recognise the multiplicity of powers attaching to the right of ownership.<sup>1234</sup> As mentioned above, the latter would be of relevance to the criminalisation of forced marriage in times of armed conflict. Human Rights Watch, in contrast, suggested to either delete the illustrative list completely or to expand it to include modern day slave-like practices like debt bondage and forced labour. Without mentioning forced marriage even though it had been recognised as a form of sexual slavery before,<sup>1235</sup> the international NGO argued that the current list would work to limit the scope of the Rome Statute due to the terminology 'such as', generally interpreted as limiting the scope of the definition to conduct of a similar

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<sup>1231</sup> Interview 14 (n 750); Robinson (n 1102) 66.

<sup>1232</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence' (n 838).

<sup>1233</sup> DEVAW (n 342).

<sup>1234</sup> PrepCom2 'Comments by Colombia on the Elements of Crimes of Article 7 in Document PCNICC/1999/L.5/Rev.1/Add.2' (n 1069) art 7(1)(g)(2); PrepCom2 'Comments by Colombia Regarding the Elements of Crimes of Article 8 (2) (b), 8 (2) (c) and 8 (2) (e) in Document PCNICC/1999/L.5/Rev.1/Add.2' (n 1069) art 8(2)(b)(xxii)(2), art 8(2)(e)(vi)(2).

<sup>1235</sup> Human Rights Watch, 'Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone' (July 1999) <<http://www.hrw.org/reports/1999/sierra/>> accessed 02 December 2014; Human Rights Watch, 'Sowing Terror: Atrocities against Civilians in Sierra Leone' (July 1998) <<http://www.hrw.org/legacy/reports98/sierra/>> accessed 02 December 2014.



nature to that specified in the list. In regard to the elements of sexual slavery, Human Rights Watch argued that deprivations of liberty would be restricted to deprivations of a similar nature to those set out in the list. Consequently, the common element to all of the examples would be a commercial exchange. Any further elaboration on the definition should be along the lines of powers of ownership that limit a person's (sexual) autonomy.<sup>1236</sup> In an article published in the *ICC Monitor*, the journal of the CICC, Fanny Fontaine, Jean Carmalt and Bruce Broomhall followed a Canadian proposal and suggested to clarify the issues arising around the list by adding to sexual slavery the same footnote as to enslavement. This clarified that forced labour, servile status and trafficking in persons fall within the scope of sexual slavery.<sup>1237</sup> The footnote reads:

“It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”<sup>1238</sup>

Therefore, it would have also covered situations where “a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status”.<sup>1239</sup> Forced labour is an element of most forced marriages in wartime and forced wives are reduced to a servile status, forced to live with their forced husbands, work for them and see to their forced husbands' needs and wishes. However, the delegates

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<sup>1236</sup> Hall, ‘The First Five Sessions of the UN Preparatory Commission for the International Criminal Court’ (n 3) 781; Human Rights Watch, ‘Commentary to the 4th Preparatory Commission Meeting for the ICC’ (March 2000) <<http://www.iccnw.org/documents/HRWRulesofProcMarch2000.pdf>> accessed 23 January 2014; Women's Caucus for Gender Justice, ‘Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence’ (n 838).

<sup>1237</sup> Bruce Broomhall, Jean Carmalt and Fanny Fontaine, ‘June Preparatory Commission will Address Important Issues’ *ICC Monitor* (New York, June 2000) 3.

<sup>1238</sup> PrepCom2 ‘Addendum: Annex III: Elements of Crimes’ (07 April 2000) (n 1224) fn 11.

<sup>1239</sup> Supplementary Slavery Convention (n 128) art 1(b).

The crime of forced labour is not specifically defined in the 1956 Supplementary Slavery Convention (n 128). However, in its preamble, the convention mentions the Convention Concerning Forced or Compulsory Labour (28 June 1930) No 29 (Forced Labour Convention) and subsequent action by the International Labour Organization in regard to forced or compulsory labour. The Forced Labour Convention defines forced labour as “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

remained reluctant to change the current language of the elements of the crime of sexual slavery as a war crime.<sup>1240</sup>

#### 7.3.3.5 *Fifth session, July 2000*

Contrary to the renewed advice of Human Rights Watch,<sup>1241</sup> the final compromise for the elements of the crime of sexual slavery worked out in the fifth session of the PrepCom2 in July 2000 did not alter the list of examples. As suggested by Canada and the Women's Caucus, a clarifying footnote was added which reads:

“It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”<sup>1242</sup>

Agreement on this language was facilitated by referring to international rules in the form of the Supplementary Slavery Convention, by describing the limits of ‘servile status’ and by repeating parts of the definition of enslavement.<sup>1243</sup> This “helped to ensure that the crime [...] include[s] slavery-like conditions such as [...] forced marriage [...] which do not require purchase or sale,”<sup>1244</sup> and “would [also] amount to other inhumane treatment within the Court’s jurisdiction under paragraph 1(k) when [it] ‘intentionally cause[s] great suffering, or serious injury to body or mental or physical health’, which would often occur in such cases”.<sup>1245</sup> The Women’s Caucus’ suggestion to include the words “with or without

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<sup>1240</sup> Human Rights Watch, ‘Commentary to the Preparatory Commission on the International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence’ (June 2000) <<http://www.iccnw.org/documents/HRWElementsofCrimeJune2000.pdf>> accessed 23 January 2014.

<sup>1241</sup> Human Rights Watch, ‘Commentary to the Preparatory Commission on the International Criminal Court’ (n 1378) 15-17.

<sup>1242</sup> PrepCom2 ‘Report of the Preparatory Commission’ (n 132) fn 18.

<sup>1243</sup> Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (n 49) 328.

<sup>1244</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence’ (n 838); See also Cottier (n 41) 446.

<sup>1245</sup> Hall, ‘Article 7 Crimes against Humanity para. 1 (c) Enslavement’ (n 541) 194.

pecuniary benefit”<sup>1246</sup> was not taken up. The Caucus also raised the point that the inclusion of a reference to trafficking would “not remedy the problematic restriction of slavery to commercial examples since trafficking involves a complex web of commercial transactions”.<sup>1247</sup> A second footnote was added to the elements of sexual slavery, recognising that, “[g]iven the complex nature of this crime”, its commission “could involve more than one perpetrator as a part of a common criminal purpose”.<sup>1248</sup> Attempts to illustrate variations, however, were rejected. It was argued that this result would be achieved by applying Article 25(3) of the Rome Statute, covering different forms of participation in the commission of a crime as well as the commission of a crime jointly with or through another person.<sup>1249</sup> As the finalised draft text of the Elements of Crimes shows, the definition of sexual slavery remained as agreed in the second PrepCom2 session.<sup>1250</sup>

In summary, the final text of the elements of crimes of sexual slavery reflects three main areas of debate. First, rejecting references to attack or chattel, the exercise of any or all of the powers attaching to the right of ownership was adopted as a test for determining slavery. Second, as a compromise, an open, illustrative list of examples of the exercise of powers attaching to the right of ownership was adopted. Third, a footnote was added to expand the illustrative list. This resulted out of the concerns of many delegations that the wording in the illustrative list would lead to an interpretation that the exercise of powers attaching to the right of ownership required a commercial or pecuniary aspect. The footnote makes it clear that the illustrative list is to be read broadly and in line with International Law instruments such as the 1956 Supplementary Slavery Convention. It confirms that commercial or pecuniary exchange or advantage is not necessary to demonstrate that a person exercised powers attaching to the right of ownership.<sup>1251</sup>

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<sup>1246</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence’ (n 838).

<sup>1247</sup> *ibid.*

<sup>1248</sup> PrepCom2 ‘Report of the Preparatory Commission’ (n 132) fn 17.

<sup>1249</sup> Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (n 49) 329.

<sup>1250</sup> PrepCom2 ‘Report of the Preparatory Commission’ (n 132).

<sup>1251</sup> Oosterveld, ‘Sexual Slavery and the International Criminal Court’ (n 50) 640-641.

#### 7.3.4 *Logics of interactions*

As discussed in Chapter 2, actors' identities, interests and actions are influenced by normative structures through different logics of interaction. In the ICC negotiations of forced marriage as a form of sexual slavery, actors' identities, interests and actions were influenced mainly through the logic of consequences (instrumentalism), appropriateness (morality and ethics), practicality (practice), arguing (rational oppositional discourse) and purposive role playing.<sup>1252</sup> Like in the negotiations of the ICC rape definition, the Arab block intervened in the discussions of the crime of sexual slavery, aiming to disconnect it from "rights, duties and obligations incident to marriage".<sup>1253</sup> This can be interpreted to have been driven by the logic of consequences. It was in the Arab block's interest to protect their national laws, cultural norms and religious principles as well as its members' sovereignty. The codification of sexual slavery in the Rome Statute can be interpreted to have been based on the logic of appropriateness, practicality and purposive role playing. It was stressed that "sexual slavery is a prevalent contemporary crime warranting express recognition, that the prohibition was sufficiently established in existing law [and] that listing the crime increases the gender-sensitivity of the Rome Statute".<sup>1254</sup> Therefore, the codification of sexual slavery was what social norms deemed right. In addition, delegates followed common sense and included sexual slavery in the Rome Statute based on its recognition under customary International Law. The Women's Caucus was very outspoken on the issue, playing its role in ensuring that gender crimes were appropriately addressed. The different drafts of definitions of sexual slavery can be interpreted to have been based on the logic of arguing. After the Rome Conference, the elements of the crime of sexual slavery were discussed at every session of the PrepCom2. Especially questions regarding the illustrative list of ways in which the right of ownership might be exercised. Eventually, as a compromise, an open, illustrative list of examples of the exercise of the powers attaching to the right of ownership was adopted. In short, the process and outcome of the ICC negotiations of forced marriage as a form of sexual slavery can be explained by actors upholding national normative structures and their concerns regarding national sovereignty,

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<sup>1252</sup> Brunnée and Toope (n 138) 7.

<sup>1253</sup> PrepCom2 'Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)' (n 66).

<sup>1254</sup> Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 622-623.

norms that were deemed right, common sense, the roles actors played in treaty negotiations, and reasonable arguments.

### *7.3.5 Conclusion on forced marriage*

Retracing who the key actors were in the ICC negotiations of forced marriage (Research Question 1) showed that the ICRC as well as the Women's Caucus were two international non-governmental delegations that drove the discussions. This confirms Hypothesis 1.<sup>1255</sup> Regarding state delegations, the Arab block, Canada, Colombia, the Holy See and the US made relevant contributions.

Based on the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict (Research Question 2),<sup>1256</sup> the ICRC,<sup>1257</sup> but first and foremost the Women's Caucus,<sup>1258</sup> were the only delegations directly mentioning forced marriage. They understood it as a form of structural violence in the form of sexual slavery (Research Question 3).<sup>1259</sup> This contradicts Hypothesis 6.<sup>1260</sup>

Taught by the Women's Caucus, states included sexual slavery in the list of sexualised crimes as a crime against humanity and a war crime. This was a creative legislative exercise because sexual slavery had not constituted an international crime in its own right before the adoption of the Rome Statute and related international rules were not very precise. The Holy See<sup>1261</sup> opposed the explicit inclusion of sexual slavery in the ICC statute but retained a reference to enslavement and involuntary servitude which would still have covered forced marriage in times of armed conflict. The Holy See's understanding of the requirement for mutual free consent to marriage for a marriage to be valid further indicates that it would not oppose the criminalisation of forced marriage. Since the

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<sup>1255</sup> Hypothesis 1 reads: NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

<sup>1256</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1257</sup> PrepCom2 'Request from the Governments' (n 1056).

<sup>1258</sup> For example Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1259</sup> Research Question 3 reads: What was the driving actors' understanding of war rape and forced marriage?

<sup>1260</sup> Hypothesis 6 reads: Structural causes of the perpetration of war rape and forced marriage were not addressed.

<sup>1261</sup> PrepCom2 'Proposal Submitted by the Holy See' (n 1170).

emphasis on free consent to marriage is based on an understanding that it is related to a person's dignity, the Holy See might understand forced marriage to be a violation of someone's dignity<sup>1262</sup> and, by extension, an honour crime. This confirms Hypothesis 5.<sup>1263</sup>

Regarding the definition of sexual slavery (Research Question 3),<sup>1264</sup> the Women's Caucus proposed a wording based on Article 1(1) of the 1926 Slavery Convention<sup>1265</sup> (Research Question 2),<sup>1266</sup> sexual slavery was defined in terms of exercising powers attaching to the right of ownership. To distinguish sexual slavery from slavery, the definition also includes the performance of sexual acts. A similar wording was proposed by Belgium and others<sup>1267</sup> as well as by Costa Rica, Hungary and Switzerland.<sup>1268</sup> Like their definition of rape, their definition of sexual slavery was influenced by ICRC research on the state of the law on (sexual) slavery (Research Question 2).<sup>1269</sup> Colombia proposed a similar definition.<sup>1270</sup> The definitions referred to here only differed in the words used to describe the sexual elements of the crime. In addition, the Women's Caucus initially introduced the explicit inclusion of 'control' in the definition. Costa Rica, Hungary and Switzerland added a reference to chattel. Neither wording was eventually adopted. The USA's reference to deprivation of liberty was adopted<sup>1271</sup> and so was its suggestion to include an illustrative list of actions that qualify as the exercise of rights attaching to the powers of ownership was taken up. In contrast to the USA's focus on direct perpetrators, however, a footnote now stresses that the commission of sexual slavery could involve more than one perpetrator as a part of a common criminal purpose.<sup>1272</sup> The inclusion and

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<sup>1262</sup> Interview 1 (n 730).

<sup>1263</sup> Hypothesis 5 reads: War rape and forced marriage were interpreted as honour crimes.

<sup>1264</sup> Research Question 3 reads: What was the driving actors' understanding of war rape and forced marriage?

<sup>1265</sup> Slavery Convention (n 127).

<sup>1266</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1267</sup> PrepCom2 'Request from the Governments' (n 1056).

<sup>1268</sup> PrepCom2 'Proposal Submitted by Costa Rica, Hungary and Switzerland on Certain Provisions of Article 8 Para. 2(b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi)' (n 1059).

<sup>1269</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1270</sup> PrepCom2 'Proposal Submitted by Colombia: Comments on the Proposal by the Delegations of Costa Rica, Hungary and Switzerland Concerning Article 8, Paragraph 2(b) of the Rome Statute (PCNICC/1999/WGEC/DP.8)' (n 1061).

<sup>1271</sup> PrepCom2 'Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum' (Crimes against Humanity) (n 1035); PrepCom2 'Proposal Submitted by the United States of America: Draft Elements of Crimes: Addendum' (War Crimes) (n 1035).

<sup>1272</sup> PrepCom2 'Report of the Preparatory Commission' (n 132).

wording of this as well as of footnote 18<sup>1273</sup> in the definition of sexual slavery was supported by the Women's Caucus and Canada. This way, Colombia's proposal<sup>1274</sup> to include an explicit reference to trafficking was respected.

Opposing these developments, the Arab block submitted a proposal<sup>1275</sup> that excludes marriage rights, duties and obligations from powers attaching to the right of ownership. As with rape, the Arab block founded its opposition on national laws, religious principles and cultural norms. Furthermore, the Arab block was motivated by fear that some of their traditional cultural and family norms could fall within the reach of crimes against humanity, as well as fear of social engineering (Research Question 2).<sup>1276</sup> This speaks in favour of Hypotheses 2<sup>1277</sup> and 3.<sup>1278</sup>

#### *7.4 Conclusion*

Building on the analysis of the ICC negotiations in general that was advanced in Chapter 6, Chapter 7 focused specifically on the negotiations of war rape and forced marriage in times of violent conflict. The aim of Chapter 7 was to analyse who the key actors were that drove the negotiations of the definitions of war rape and forced marriage (Research Question 1) and why they got involved in the ICC negotiations of these two crimes and what influenced their positions (Research Question 2). Another goal was to examine how these actors interpreted the crimes of war rape and forced marriage (Research Question 3).

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<sup>1273</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court (n 36) art 7(1)(g)(2): "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children."

<sup>1274</sup> PrepCom2 'Comments by Colombia on the Elements of Crimes of Article 7 in Document PCNICC/1999/L.5/Rev.1/Add.2' (n 1069); PrepCom2 'Comments by Colombia Regarding the Elements of Crimes of Article 8 (2) (b), 8 (2) (c) and 8 (2) (e) in Document PCNICC/1999/L.5/Rev.1/Add.2' (n 1069).

<sup>1275</sup> PrepCom2 'Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)' (n 66).

<sup>1276</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1277</sup> Hypothesis 2 reads: States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage.

<sup>1278</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

Addressing Research Question 1,<sup>1279</sup> the ICRC and especially the Women's Caucus as non-state actors (confirming Hypothesis 1),<sup>1280</sup> as well as the Arab block, Colombia and the US as state actors drove the ICC negotiations of the crimes of war rape and forced marriage in times of armed conflict.

Regarding Research Question 2,<sup>1281</sup> Chapter 7 confirmed Martha Finnemore's and Peter Katzenstein's theories that international as well as national norms and rules matter in international relations and law-making. The Arab block's, Columbia's and the US' national normative structures had an impact on the ICC negotiations. Amongst the international normative structures that influenced the negotiations were the 1907 Hague and 1949 Geneva conventions, Protocol I and II Additional to the Geneva Conventions, the 1926 Slavery Convention, and the ICTY and ICTR instruments and judgments in the *Akayesu* and *Furundžija* cases. In addition, the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict as well as the Vienna and Beijing conferences and Platforms for Action were referred to. However, due to the actors' different mandates, common sources of information were interpreted and used differently.

Addressing Research Question 3,<sup>1282</sup> in the negotiations of the definition of both war rape and forced marriage, the Women's Caucus taught its views to states. As a non-state and therefore outside actor in international law-making, it presented problems and solutions to states. Rather than sticking to their initial proposals and including rape as constituting other crimes like an outrage upon personal dignity, states followed the Caucus and listed sexualised crimes in the Rome Statute as separate offenses as well as possibly constituting other crimes. This understanding avoids marginalising sexualised crimes and is in line with the prohibition of gender-based discrimination. The Women's Caucus was also partly successful in teaching states to construct a definition of rape using the term 'invasion' rather than 'penetration' as that would create a broader, more inclusive, gender-neutral definition that highlights rape as an assault on a person's integrity and autonomy

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<sup>1279</sup> Research Question 1 reads: Who were the driving actors in the process of defining war rape and seeking to define forced marriage?

<sup>1280</sup> Hypothesis 1 reads: NGOs in general and women's organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

<sup>1281</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1282</sup> Research Question 3 reads: What was the driving actors' understanding of war rape and forced marriage?



rather than honour and dignity. A rape definition using ‘invasion’ emphasises that rape is an act of violence and domination. Following the Women’s Caucus, Costa Rica advocated a rape definition using the term ‘invasion’. The ICRC was another crucial non-governmental actor that influenced the definition of war rape. However, as the guardian of International Humanitarian Law, it had to take a more conservative stance. Based on ICRC research, Belgium, Colombia, Costa Rica, Finland, Hungary, Korea, South Africa and Switzerland suggested definitions using the term ‘penetration’. This was also advanced by the US. Considering the importance of consensus in the ICC negotiations, the final wording of the definition of rape was a compromise that included suggestions from both sides. Another example of a situation in which the Women’s Caucus taught its views to states is the move away from the initial understanding of rape as an outrage upon personal dignity and therefore a victim-centred honour crime, towards a focus on the perpetrator and an interpretation of rape as a form of structural violence that is rooted in patriarchy. A focus on the perpetrator is also achieved by constructing a broad coercion-based rather than consent-based definition. These views were adopted by the US.

Regarding forced marriage, only the Women’s Caucus and the ICRC explicitly mentioned the crime in their discussions. Both understood it as a form of sexual slavery that was defined based on the 1926 Slavery Convention definition of slavery with an added sexual element. Here, again, Belgium and others, Colombia, Costa Rica together with Hungary and Switzerland, and the US submitted relevant proposals and Canada was also involved in the discussions. However, since the Caucus was the first actor to introduce the issue in the ICC negotiations, it can be said that it taught its views to states.

The Women’s Caucus, however, did not always succeed in teaching its views to states. As the expression of ‘invasion resulting in penetration’ shows, its call not to construct a rape definition with cumbersome and unnecessarily specific wording was not followed. Indicating that the Caucus did not always follow its own advice, it suggested to include the words “with or without pecuniary benefit”<sup>1283</sup> in the definition of sexual slavery. This, however, was not taken up. In general, the analysis of the development of the definition of rape and sexual slavery indicated that the Women’s Caucus succeeded more in teaching its views on rape than its views on sexual slavery to states. In the negotiations of the definition of sexual slavery, the (Supplementary) Slavery Convention, the report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and

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<sup>1283</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence’ (n 838).

Slavery-Like Practices during Armed Conflict, and the *Foča* indictment appeared to have been more influential than the Caucus. Since the mere direct inclusion of sexual slavery already constituted a creative law-making exercise, delegates supposedly wanted to err on the side of caution in defining the crime so as not to jeopardise their gains and potentially even the whole ICC project. They had to keep in mind that every proposition that encountered significant opposition might have been the straw to break the camel's back.<sup>1284</sup> Therefore, they stayed away from more progressive definitions that could have explicitly included forced marriage in times of armed conflict and relied on established international rules like the (Supplementary) Slavery Convention in defining sexual slavery. A similar theory can be developed when taking into account that forced marriage was mentioned more often and directly in relation to the crime of enslavement and slavery, two established offenses. This solid ground offered scope for progressive elaborations and definitions that included forced marriage in times of armed conflict.

Colombia, the ICRC, the US and the Women's Caucus faced opposition from the Arab block. Falling back on national laws, religious principles and cultural norms (Research Question 2),<sup>1285</sup> it introduced a proposal that would have made marital sexual intercourse consensual by definition. It also would have excluded marriage rights, duties and obligations from powers attaching to the right of ownership. The Arab block's proposal arose out of concern that some of its traditional family and cultural norms could fall within the reach of crimes against humanity as well as out of concern about social engineering. This confirms Hypotheses 2<sup>1286</sup> and 3.<sup>1287</sup> It also speaks in favour of Peter Katzenstein's theory that national norms and rules matter in international relations.

In addition to analysing who the main actors were in the ICC negotiations of war rape and forced marriage in times of armed conflict, what influenced them and how they defined the crimes, Hypotheses 5<sup>1288</sup> and 6<sup>1289</sup> focus on a broader view of rape and forced

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<sup>1284</sup> Interview 18 (n 5).

<sup>1285</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1286</sup> Hypothesis 2 reads: States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage.

<sup>1287</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

<sup>1288</sup> Hypothesis 5 reads: War rape and forced marriage were interpreted as honour crimes.

<sup>1289</sup> Hypothesis 6 reads: Structural causes of the perpetration of war rape and forced marriage were not addressed.

marriage. The initial inclusion of war rape as an outrage upon personal dignity in the ILC draft statute as well as the Arab block's national understanding of the crime that influenced its position in the ICC negotiations demonstrate that war rape was at least partly understood as an honour crime. This confirms Hypothesis 5. However, refuting Hypothesis 6, the Women's Caucus saw rape as a form of structural violence that is rooted in patriarchy. It advanced the same general understanding to sexual slavery and, by extension, forced marriage. The Holy See, in contrast, might have interpreted forced marriage as an honour crime as it is a violation of someone's dignity.

Comparing the process of defining war rape and forced marriage under the ICC instruments highlights that largely the same actors were involved in the negotiations of both crimes. Non-state actors, especially the Women's Caucus, played a role in both the discussions of war rape and of forced marriage. Actors from states with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed development of progressive definitions of war rape and forced marriage. This indicates that actors in the ICC negotiations of both crimes were shaping, and being shaped by, national and international norms and rules. The compromise definition of war rape that all actors could agree on defines the crime as an 'invasion resulting in penetration'. Forced marriage was understood as a form of sexual slavery and not defined as a crime in and of itself. Therefore, the actors in the ICC negotiations did not develop elements of the crime of forced marriage. Both war rape and forced marriage were understood as honour crimes by some actors who participated in the ICC negotiations, and as a form of structural violence by others.

## **8 The Women's Caucus' understanding of forced marriage**

### *8.1 Introduction*

Chapters 8 and 9 present a more detailed snapshot of a specific part of the ICC negotiations already mentioned in Chapter 7. Chapter 8 further analyses the Women's Caucus' understanding of the crime of forced marriage as a form of sexual slavery (Research Question 3). Based on the recommendations and comments the Caucus submitted at different stages of the ICC negotiations, this chapter scrutinises the terminology the Women's Caucus used and the examples it gave. Chapter 8 also examines the sources of information the Women's Caucus referred to. Therefore, it studies how the Caucus as a specific NGO came to hold its views that it then taught to states, addressing Research Question 2.<sup>1290</sup> Chapter 8 considers whether the Caucus incorrectly viewed forced marriage as a purely sexual crime or if the sexual elements of a forced marriage were exaggerated, potentially explaining the group's understanding of the crime of forced marriage as a form of sexual slavery.

Chapter 8 consists of three parts. Part 8.2 analyses how the Women's Caucus defined forced marriage. Digging deeper, parts 8.3 and 8.4 examine why the Caucus defined forced marriage as a form of sexual slavery. Addressing this question, part 8.3 studies the examples of sexual slavery the Women's Caucus referred to in written comments and recommendations to the ICC negotiations. These examples give information about how the Caucus understood sexual slavery, and forced marriage as a specific form of sexual slavery. They also indicate that the group's understanding of these crimes was influenced by the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict. This is elaborated on in part 8.4 of this chapter.

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<sup>1290</sup> Research Question 2 reads: What influenced the driving actors?

## 8.2 *Forced marriage as a form of gender violence*

Echoed by Amnesty International,<sup>1291</sup> the Women's Caucus was the driving actor in raising questions regarding forced marriage in the PrepCom and PrepCom2 discussions. In the context of a discussion about the incorporation of the principle of non-discrimination, it defined forced marriage as a form of gender violence.<sup>1292</sup>

The Caucus explicitly stated that gender violence includes acts of sexual and non-sexual violence. Linking it to the crime of slavery, it noted that sexual gender violence serves "to signal male ownership over [women] as property".<sup>1293</sup> Both the definition of gender violence and sexual gender violence can be classified as male as they create and perpetuate an understanding of women as victims and men as perpetrators. Even though a clear reference was made to the non-sexual and sexual elements of the crime, "the enslavement of women through forced marriage or otherwise for domestic as well as sexual service"<sup>1294</sup> was given as an example of a non-sexual act of gender violence.<sup>1295</sup> Forced marriage was listed together with acts of psychological and physical violence of a non-sexual nature as well as violent acts that are linked to a women's sexuality, such as forced pregnancy and forced sterilisation.

It becomes apparent that, in addition to bringing forward male definitions, the Women's Caucus did not establish a sharp distinction between sexual and non-sexual gender violence. Nevertheless, it clearly recognised both elements of the crime of forced marriage which it defined as a form of enslavement and slavery. It becomes obvious that the Women's Caucus did not misunderstand forced marriage as a purely sexual crime and categorised forced marriage as a form of sexual slavery as a result of this misunderstanding. The next part of this chapter analyses whether an overemphasis on the sexual elements could explain why the Caucus viewed forced marriage this way.

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<sup>1291</sup> Amnesty International, 'The International Criminal Court: Preliminary Comments Concerning the Elements of War Crimes other than Grave Breaches of the Geneva Conventions - Part I' (July 1999) <<http://amnesty.org/en/library/asset/IOR40/011/1999/en/4304ad8f-e10c-11dd-b0b0-b705f60696a0/ior400111999en.html>> accessed 05 March 2014.

<sup>1292</sup> Interview 10 (n 432); Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1293</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1294</sup> *ibid.*

<sup>1295</sup> Interview 10 (n 432).

### *8.3 Examples of sexual slavery*

The following paragraphs analyse the examples of sexual slavery the Women's Caucus gave in written comments and recommendations to the ICC negotiations. They illustrate the Caucus' understanding of sexual slavery, and of forced marriage as a specific form of sexual slavery. As the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict referred to the same examples in her Final Report, it can be assumed that the Women's Caucus' understanding of sexual slavery and forced marriage as a form of sexual slavery was influenced by the Final Report. The examples below discuss experiences of women in World War Two Japan, Yugoslav rape camps, the Rwandan genocide and the conflicts in Myanmar (Burma), Liberia and Uganda. Comparisons to forced marriage as it is understood for the purpose of this thesis are established.<sup>1296</sup> Furthermore, the focus of the Women's Caucus' inquiry is scrutinised. It becomes apparent that the Caucus recognised the sexual and non-sexual elements of forced marriage but emphasised the former. This could explain the groups' understanding of forced marriage as a form of sexual slavery.

In the context of recommending the mainstreaming of issues of sexualised violence, the Women's Caucus developed a definition of slavery and enslavement<sup>1297</sup> that clearly recognises the sexual and non-sexual elements of the crime as well as of forced marriage. Nevertheless, enslavement is understood as gendered because it exploits women's and men's traditional gender roles.<sup>1298</sup> This can also be seen from the examples the Women's Caucus gave of situations of sexual slavery. They establish women as victims, perpetuating male stereotypes.

Quoting the UN Special Rapporteur on Violence against Women, its Causes and Consequences and also referring to international norms in the form of the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, the Women's Caucus defined the situation

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<sup>1296</sup> See Chapters 4 and 5 for elaborations on the understanding of forced marriage advanced in this thesis.

<sup>1297</sup> Interview 17 (n 5); Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1298</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

of the comfort women as institutionalised sexual slavery.<sup>1299</sup> During the Second World War, comfort women were forced to provide sexual services for members of the Japanese armed forces. This way, the Japanese Army wanted to reduce the number of rapes that occurred in occupied communities, aiming not to antagonise the local population even more. The enslavement of women also intended to decrease threats of espionage and potential leaks about military tactics and operations. Additionally, institutional scrutiny and outrage, as occurred after the fall of Nanking, was to be avoided. Built into this motivation was the male understanding that soldiers need to have sex to keep fighting. Their continuing ability to fight was also to be ensured by minimising sexually transmitted diseases amongst the troops through providing the opportunity to have intercourse with comfort women who underwent medical checks rather than with local women who did not.<sup>1300</sup> In addition to the recruitment of ‘willing’ women who already worked as prostitutes, women were recruited by means of deception, purchase, force, coercion and/or abduction.<sup>1301</sup> At first glance, rules and regulations for comfort women and their users seem to show concern for the women’s correct treatment.

“The prohibition of alcohol and swords, the regulation of hours of service, reasonable payment and other attempts to impose what would appear to be a sense of decorum or fair treatment [, however,] are in stark contrast with the brutality and cruelty of the practice. This only serves to highlight the extraordinary inhumanity of a system of military sexual slavery”.<sup>1302</sup>

Comfort women had to endure sexual subjugation and mutilation, forced sterilisation, multiple rapes, severe physical abuse and acts of torture as well as malnutrition and poor

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<sup>1299</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430); Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>1300</sup> Carmen M Argibay, ‘Sexual Slavery and the Comfort Women of World War II’ (2003) 21 *Berkeley Journal of International Law* 375, 376-377; Copelon, ‘Gender Crimes as War Crimes’ (n 59) 222; United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45: Report on the Mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime’ (04 January 1996) UN Doc E/CN.4/1996/53/Add.1; Patricia Visser Sellers, ‘Wartime Female Slavery: Enslavement?’ (2011) 44 *Cornell International Law Journal* 115, 117.

<sup>1301</sup> Argibay (n 1300) 377-379; United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45’ (n 1300).

<sup>1302</sup> United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45’ (n 1300).

living conditions. In addition to often being exposed to front-line threats, comfort women lived under constant fear of further abuse, of being killed, catching sexually transmitted diseases and becoming pregnant. Some were never allowed to leave the camp, others were allowed to take walks at set times and others again were allowed to go on trips. Either way, however, their freedom of movement as well as their personal freedom was restricted.<sup>1303</sup>

Parallels can be drawn between the situation of the comfort women and forced wives and the kinds of abuses both groups were subjected to. Both had to endure sexual subjugation, rapes, physical abuse and torture. Both lived in constant fear. Some comfort women were allowed to leave the camp. Forced wives were allowed to move freely to complete their tasks. A difference between the situation of the comfort women and forced wives is that the reality of forced wives – as the Women’s Caucus recognised – included providing sexual and domestic services exclusively to their forced husbands. Comfort women, in contrast, had to sexually serve many men but had no domestic tasks.<sup>1304</sup> Therefore, by referring to these examples of different kinds of sexual and non-sexual gender violence in conjunction, the Women’s Caucus created the impression that the crime of forced marriage would predominately be a sexual crime. This could explain why the Caucus understood forced marriage as a form of sexual slavery.

Making this misleading emphasis on the sexual elements of gender violence even more obvious, the Women’s Caucus gave the rape camps in the former Yugoslavia as another example of institutionalised sexual slavery.<sup>1305</sup> During the wars in the former Yugoslavia in the 1990s, the creation of rape camps was one hallmark of the terror against the civilian population aimed at humiliating them and instilling fear. In the rape camps, women were detained, tortured and brutalised repeatedly by many different assailants over long periods of time. Sometimes women were forcefully taken from a larger rape camp such as Partizan Sports Hall, brought to a particular soldier’s home and brutalised there, only to be returned to the camp to suffer more sexualised violence. A survivor, Mirsada, remembered sexual as well as non-sexual elements of the crimes committed against her that can be compared to the tasks of a forced wife.

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<sup>1303</sup> United Nations Commission on Human Rights ‘Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45’ (n 1300) 3-16.

<sup>1304</sup> Copelon, ‘Gender Crimes as War Crimes’ (n 59) 222: Copelon, however, states that comfort women provided sexual as well as domestic services to Japanese troops.

<sup>1305</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430).



“The White Eagles would come to get us every night. They would bring us back in the morning. There were nights when more than 20 of them came. That seemed to be some kind of honor. They did all kinds of things to us. It cannot be described, and I don’t want to remember. We had to cook for them, and serve them, naked. They raped and slaughtered some girls right in front of us. Those who resisted had their breasts cut.”<sup>1306</sup>

However again the focus clearly lies on the sexual elements and even non-sexual components like cooking and serving her captors are sexualised through the fact that Mirsada had to carry out these tasks naked.<sup>1307</sup>

In addition to establishing a link between the crime of forced marriage in times of armed conflict, the situation of the comfort women, and the rape camps established during the war in the former Yugoslavia, the Women’s Caucus also linked forced marriage to women’s experiences of the Rwandan genocide in 1994. Explicitly using the language of marriage, the Women’s Caucus categorised “the practice of taking women as ‘temporary wives’ or [...] forced ‘temporary marriage’”<sup>1308</sup> as sexual and gendered enslavement,<sup>1309</sup> but also as individualised sexual slavery.<sup>1310</sup>

The emphasis on the temporary nature of forced marriage stands in contrast to African Rights’ definition of the crime. The non-governmental organisation distinguished forced marriage from sexual slavery based on the period of time intended to spend together rather than on the dominance of sexual or non-sexual elements. African Rights stressed that “the behaviour of these men [made clear that] they [...] intended to keep the women indefinitely.”<sup>1311</sup> This understanding was supported by stories forced wives told about their forced husbands who obtained Hutu identification cards for them and made preparations to

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<sup>1306</sup> Michele Lent Hirsch, ‘Conflict Profiles: Bosnia’ (08 February 2012) Women Under Siege <<http://www.womenundersiegeproject.org/conflicts/profile/bosnia>> accessed 12 March 2014.

<sup>1307</sup> — — ‘Testimony: A Trio of Women’s Voices Bears Witness to the Horror of War and Rape as Yugoslavia Disintegrates’ *Los Angeles Times* (Los Angeles, 31 January 1993) <[http://articles.latimes.com/1993-01-31/magazine/tm-857\\_1\\_serbian](http://articles.latimes.com/1993-01-31/magazine/tm-857_1_serbian)> accessed 12 March 2014; Hirsch (n 1306).

<sup>1308</sup> Women’s Caucus for Gender Justice, ‘Recommendations and Commentary for December 1997 PrepCom’ (n 50).

<sup>1309</sup> *ibid.*

<sup>1310</sup> Women’s Caucus for Gender Justice, ‘Priority Concerns Related to the Elements Annex’ (n 430): Note that in establishing the distinction of institutionalised and individualised sexual slavery, the Women’s Caucus built on, and expanded, the dualism and distinction between the public and the private sphere.

<sup>1311</sup> African Rights (n 10) 778.

flee together.<sup>1312</sup> Human Rights Watch also found that in some cases, forced wives stayed with their forced husbands for socio-economic reasons after the genocide.<sup>1313</sup>

Comparable to the findings of African Rights<sup>1314</sup> and Human Rights Watch<sup>1315</sup> as well as the understanding of forced marriage in times of armed conflict advanced in this thesis, the Women's Caucus described experiences of Rwandan women who were separated from their families, kidnapped, bought and sold, allocated, or chose to become a concubine or to submit themselves to conditions of sexual slavery and forced marriage as a means of survival.<sup>1316</sup> Connected to looting sprees, women were seen as spoils of genocide that beautifully completed men's victory. In contrast, forcing women into marriage with undesired men served as a means of humiliation. Some forced wives were physically confined to the home. Some were free to leave only at the risk of being killed because they left the protected marriage status, emphasising their complete dependency on their forced husbands.<sup>1317</sup> Vestine, a survivor, remembered that she had "limited freedom to move around, to pick food, cook for [herself] and even to work in the fields."<sup>1318</sup> Here, in addition to the dominant account of the sexual elements, the non-sexual elements of the crime of forced marriage become apparent.

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<sup>1312</sup> African Rights (n 10) 748-797.

<sup>1313</sup> Human Rights Watch, 'Shattered Lives' (n 380) 28

In Interview 17 (n 5), the present researcher was told that the Women's Caucus had based its awareness of the crime of forced marriage in times of armed conflict on the Human Rights Watch report 'Shattered Lives'. In the Caucus' written comments and recommendations to the ICC negotiations, however, this report is only referred to in December 1997. It provided examples from Rwanda for sexualised and gender-based violence that could be understood as constitutive of the war crimes of wilful killing and mutilation.

<sup>1314</sup> African Rights (n 10) 748-797.

<sup>1315</sup> Human Rights Watch, 'Shattered Lives' (n 380).

<sup>1316</sup> Amnesty International, 'The International Criminal Court: Preliminary comments concerning the elements of war crimes other than grave breaches of the Geneva Conventions - Part I' (n 1291); Women's Caucus for Gender Justice, 'Priority Concerns Related to the Elements Annex' (n 430); Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50): In the context of a discussion of the element of coercion in the crime of rape, the Women's Caucus conveyed a similar understanding as in its recommendations and comments to the December 1997 PrepCom. It stated that the "abuse of authority and threats to deny or promises to provide the means of survival are critical if situations are to be included where women 'choose' to trade sexual service in order to survive, such as forced temporary marriage and other slave-like conditions". This is contrasted by a later statement made in February 1999 (n 430), linking forced marriage to forced domestic labour rather than survival sex. In support, Amnesty International stated that "[s]exual slavery [...] encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour that ultimately involves forced sexual activity".

<sup>1317</sup> African Rights (n 10) 748-797; Women's Caucus for Gender Justice, 'Priority Concerns Related to the Elements Annex' (n 430).

<sup>1318</sup> African Rights (n 10) 787.

Emphasising the sexual elements of forced marriage, in the Rwandan context, the notion of marriage was clearly linked to the crime of rape. Human Rights Watch's report focuses on the rape of women during the Rwandan genocide. In this framework, it discusses forced marriage as a form of individualised sexual slavery.<sup>1319</sup> In women's testimonies collected by African Rights, the terms 'being taken' and 'being married' both appear to refer to rape. Survivor Catherine told the story of how she was discovered when hiding in a field. One of her captors, Patrice, announced that he would "take [her]". The other men became angry and argued that she "should [...] be enjoyed by all of them". Patrice replied that she "would be killed by being 'married' to all of them".<sup>1320</sup> During the Rwandan genocide, promises of marriage were also used as a justification for rapes. Two other survivors, Thérèse and Christine, told how two brothers who offered to hide them in their homes took advantage of the situation and "raped [them], saying that they would marry [them] when the fighting finished."<sup>1321</sup> Awareness existed that these forced marriages were not 'real' marriages. Most women quoted in the report referred to their forced husband as their "abductor[s]"<sup>1322</sup> rather than their husbands. Vestine was the only woman quoted, stating that she and her forced husband "began living as man and wife" and who referred to herself as the "wife" and to the man as her "husband".<sup>1323</sup> Reflecting the ethnic component of the Rwandan genocide, it has to be noted that amongst the Hutu community, forced inter-marriages were not accepted. While forced wives were a status symbol for male fighters in Sierra Leone and Uganda, Hutu men had to bribe others into silence about their relationships and were seen as Tutsi accomplices. They were ordered to hand over their Tutsi wives to be killed. However, when men kept women as sex slaves without marrying them, they also had to face criticism and the stigma of being impotent because they did not marry the women.<sup>1324</sup>

The Women's Caucus' comments and recommendations in the ICC negotiations also refer to the experience of women in Burma, which are very different from that of forced wives in, for example, Rwanda but also from the experiences of women in Sierra

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<sup>1319</sup> Human Rights Watch, 'Shattered Lives' (n 380).

<sup>1320</sup> African Rights (n 10) 772-773.

<sup>1321</sup> African Rights (n 10) 778.

<sup>1322</sup> African Rights (n 10) 754-755.

<sup>1323</sup> African Rights (n 10) 787.

<sup>1324</sup> African Rights (n 10) 778-788; Human Rights Watch, 'Shattered Lives' (n 380) 26.

Leone and Uganda. In Burma, sexualised violence is used by the military regime to quell opposition and to maintain its power.<sup>1325</sup> Blurring the line between rape and forced marriage as in Rwanda, some evidence indicates that “soldiers use rape to coerce women into marriage and to impregnate them so they will bear ‘Burman’ babies, known as a campaign of ‘Burmanization.’”<sup>1326</sup> Burmese soldiers, married or unmarried, are promised certain rewards if they married women from certain ethnic groups. They are encouraged to leave their “blood [...] in the village”.<sup>1327</sup> Similar to the situation in Uganda, many acts of sexualised violence occur in conjunction with other Human Rights abuses such as forced relocation, forced labour, slavery and torture. Comparable to the fate of the comfort women in Japan, women in Burma are forcibly conscripted by the military into situations of sexual slavery.<sup>1328</sup> Even though the sexual elements of gender violence are stressed again, a Burmese survivor recalled sexual and non-sexual violations she was subjected to when she was kept as a porter:

“I was kept as a porter in October. They said it would only be for four days, but they kept me for one month and four days. ... At night I couldn’t sleep because I often saw guards come and take the youngest girls away. ... Two times I had to carry separately from the rest of the group, and ended up alone in the forest with the soldiers at night. Both times the soldiers came to me and beat me, showed me their guns to keep me quiet, and then raped me.”<sup>1329</sup>

Similarly, during the civil war in Liberia, women were abducted, raped, forced into survival sex or exploited as sex slaves.<sup>1330</sup> Comparable to accounts of forced marriage from Burma, the Women’s Caucus in its comments and recommendations in the ICC

<sup>1325</sup> Jovana Crncevic, ‘Conflict Profiles: Burma’ (17 December 2012) Women Under Siege <<http://www.womenundersiegeproject.org/conflicts/profile/Burma>> accessed 12 March 2014.

<sup>1326</sup> Betsy Apple and Veronika Martin, ‘No Safe Place: Burma’s Army and the Rape of Ethnic Women’ (April 2003) Refugees International 24 <<http://www.refworld.org/docid/47a6eb9a0.html>> accessed 12 March 2014.

<sup>1327</sup> Betsy Apple, ‘School for Rape: The Burmese Military and Sexual Violence’ (1998) EarthRights International <<http://www.earthrights.org/publication/school-rape-burmese-military-and-sexual-violence>> accessed 12 March 2014.

<sup>1328</sup> Crncevic (n 1325); Women’s Caucus for Gender Justice, ‘Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence’ (n 838); See also United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 30, para 67.

<sup>1329</sup> Apple (n 1327).

<sup>1330</sup> — — ‘Liberia: “The new war is rape”’ IRIN (19 November 2009) <<http://www.irinnews.org/report/87122/liberia-the-new-war-is-rape>> accessed 12 March 2014.

negotiations stated that Liberian militias forced women into forced labour, including washing, cooking and looting as well as into sexual slavery and forced marriage as a way of rewarding soldiers.<sup>1331</sup>

In addition to the situation of the comfort women, the rape camps in the former Yugoslavia and Rwandan, Burmese and Liberian women's experiences of forced marriage, the Women's Caucus also referred to the situation in Uganda where "rebels [...] abduct children and use them as forced labourers, child soldiers and sexual slaves [and] [g]irls [...] are given to commanders as 'wives'".<sup>1332</sup> In addition to indicating that a forced marriage consists of sexual and non-sexual elements, here the Women's Caucus recognised the interconnection with the recruitment of child soldiers, potentially breaking with traditional understandings of women's gender roles as wives, housewives and mothers.

This account of Liberian and Ugandan women's experiences is very similar to the understanding of forced marriage advanced in this thesis. The Women's Caucus' examples of Liberia and Uganda highlight that forced marriage includes acts of sexual and non-sexual gender violence. This contradicts the Caucus' understanding of forced marriage as a form of sexual slavery as it places a focus on the sexual elements of the crime.

As mentioned above, the Women's Caucus' examples of the Japanese comfort women and the rape camps in the former Yugoslavia place a misleading, male emphasis on the sexual elements of gender violence. In contrast, the examples the Caucus gave of Rwandan, Burmese, Liberian and Ugandan women's experiences of forced marriage show that the crime consists of sexual and non-sexual elements. Nonetheless, the Women's Caucus placed an emphasis on the former. This could explain why the group saw forced marriage as a form of sexual slavery. However, the question arises whether the Women's

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<sup>1331</sup> Erin Bernstein, Sabrina Karim and Pamela Scully, 'Conflict Profiles: Liberia' (3 September 2013) Women Under Siege <<http://www.womenundersiegeproject.org/conflicts/profile/liberia>> accessed 12 March 2014; Women's Caucus for Gender Justice, 'Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence' (n 838); See also United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3) para 30.

<sup>1332</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence' (n 838).

Caucus was not taken aback by the incompatibility of the non-sexual elements of forced marriage with the crime of sexual slavery.

According to an affiliate of the Women's Caucus and members of the CICC, it was not. Instead, the Women's Caucus discussed forced marriage only in the context of sexual violence, as a form of sexual slavery, as this was the way forced marriage was understood by the international community at the time of the ICC negotiations.<sup>1333</sup> Therefore, the crime was not discussed in depth and other issues like the relationship between the crimes of trafficking and sexual slavery as well as between sexual slavery, enslavement and forced prostitution took precedence.<sup>1334</sup> The Caucus "simply believed that, in fact, forced marriage is sexual slavery [and] what matters as a crime [are] sexual aspects that make it the crime of sexual slavery".<sup>1335</sup> This, however, neglects the non-sexual elements of a forced marriage that are not captured in the categorisation of the conduct as a form of sexual slavery. Based on the view quoted above, both the crime of sexual slavery and forced marriage were "strengthened";<sup>1336</sup> sexual slavery by including forced marriage, and forced marriage by being "clearly"<sup>1337</sup> included in sexual slavery because through this, it was identified as a serious crime.<sup>1338</sup>

Contrary to this, another member of the CICC stated that women's advocates would have liked forced marriage to be listed as a separate crime in the ICC instruments. However, if the sacredness of the institution of marriage is stressed and if forced marriage is constructed as a social issue, subsuming forced marriage under sexual slavery arguably constituted a compromise that satisfied concerns of more conservative states.<sup>1339</sup>

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<sup>1333</sup> Brunnée and Toope (n 138): Here, the Women's Caucus might have been driven by the logic of appropriateness in the sense that it followed what social norms deemed right.

<sup>1334</sup> Interview 17 (n 5); Interview 18 (n 5).

<sup>1335</sup> Interview 9 (n 430); Interview 11 (n 733).

<sup>1336</sup> Interview 11 (n 733).

<sup>1337</sup> *ibid.*

<sup>1338</sup> Brunnée and Toope (n 138): This indicates that the Women's Caucus might have been driven by the logic of consequences in defining forced marriage as a form of sexual slavery. It might have been in the Caucus' interest to strengthen both crimes.

<sup>1339</sup> Interview 8 (n 744); Interview 18 (n 5).

Brunnée and Toope (n 138): This indicates that actors in the ICC negotiations might have been driven by the logic of consequences in defining forced marriage as a form of sexual slavery. It might have been in their interest to protect the traditional institution of marriage.

#### 8.4 Sources of information

In contrast to the limited discussions of forced marriage in the ICC negotiations, the sources of information referred to, the terms used and examples cited in the writings of the Women's Caucus<sup>1340</sup> paint a more complex picture of the conduct. The Caucus' awareness of the crime of forced marriage appears to have been based especially on the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, Gay J McDougall, conveying international norms.<sup>1341</sup>

Since McDougall's Final Report precedes the relevant recommendations and comments raised by the Women's Caucus in the ICC negotiations, it can be supposed that the latter adopted the terminology used by the former in regard to "forced, temporary marriage".<sup>1342</sup>

The Special Rapporteur's Final Report explicitly states that "[o]ne significant impetus for the [...] decision to commission this study was the increasing international recognition of the true scope and character of the harms perpetrated against the [comfort women in Japan] during the Second World War."<sup>1343</sup> In addition, like the documents prepared by the Women's Caucus, the Final Report refers to the rape camps established in the 1990s during the war in the former Yugoslavia, as well as the situation of women who

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<sup>1340</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence' (n 838).

<sup>1341</sup> United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3); See also Interview 17 (n 5); Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 621 on the Women's Caucus and the Special Rapporteur on forced prostitution and sexual slavery.

Considering that the UN Special Rapporteur on Violence against Women, its Causes and Consequences referred to forced marriage in her reports from 1995 on, it initially appears odd that the Women's Caucus only referred to these reports to support its understanding of the situation of the comfort women during the Second World War as sexual slavery. However, since the Special Rapporteur on Violence against Women, its Causes and Consequences did not go into any detailed discussion of forced marriage, but the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict did, the Women's Caucus' repeated reference to the latter's Final Report is understandable.

Brunnée and Toope (n 138): The Women's Caucus' reliance on the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict can be interpreted to have been based on the logic of appropriateness. The Caucus appears to have followed common sense in drawing on the only document that discussed forced marriage in times of armed conflict in detail at the time.

<sup>1342</sup> United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3) para 8; Women's Caucus for Gender Justice, 'Recommendations and Commentary for December 1997 PrepCom' (n 50).

<sup>1343</sup> United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3) para 6.

were subjected to sexualised war violence, including forced marriage, in Rwanda, Burma, Liberia and Uganda.<sup>1344</sup> By listing them together, the report connects sexual slavery, the establishment of rape camps, (gang) rape, forced marriage, forced labour, sexual mutilation and torture.<sup>1345</sup> Supported by the statement that “[s]exual slavery also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour that ultimately involves forced sexual activity”,<sup>1346</sup> the connections established indicate that McDougall recognised the sexual as well as non-sexual elements of the crime of forced marriage. She even went so far as to state that “[t]he link between rape and slavery [...] is not accidental; many cases of sexual violence committed during armed conflict are most appropriately prosecutable as slavery.”<sup>1347</sup> She stressed that (sexual) slavery constitutes a crime regardless of whether it was committed by public or private actors and that, furthermore, a pecuniary element is not necessary. Either way, the exercise of powers attaching to the right of ownership leads to limitations on autonomy, freedom of movement and sexual self-determination. Following the understanding brought forward in the indictment in the *Foča* case discussed in Chapters 4, McDougall clarified that sexual slavery extends to situations where a woman is technically free to leave but is prevented from doing so by the coercive circumstances she finds herself in. McDougall made clear that “[t]he term ‘sexual’ is used [...] as an adjective to describe a form of slavery, not to denote a separate crime.”<sup>1348</sup> It “denotes the result of this particular crime [...]: limitations on one’s autonomy, freedom of movement and power to decide matters relating to one’s sexual activity.”<sup>1349</sup> She elaborated that “[i]n all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm in

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<sup>1344</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 8, para 22-23, para 30, para 66-67, para 81, para 114, fn 17.

<sup>1345</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 10.

<sup>1346</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 30.

<sup>1347</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 17.

Brunnée and Toope (n 138): The wording indicates that the Special Rapporteur might have been driven by the logic of appropriateness in arguing that “many cases of sexual violence committed during armed conflict are most appropriately prosecutable as slavery”. She followed what social norms deemed right.

<sup>1348</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 26.

<sup>1349</sup> Boot (n 40) 211.



customary International Law.”<sup>1350</sup> To establish this, McDougall referred to the judgment of the International Court of Justice (ICJ) in the *Case Concerning the Barcelona Traction, Light and Power Co., Limited*<sup>1351</sup> as precedent. Here, the ICJ stated that *erga omnes* “obligations derive, for example, in contemporary international law, [...] from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” *Erga omnes* obligations “[pertain] to the legal implications arising out of a certain crime’s characterization as *jus cogens*.”<sup>1352</sup> Consequently, by stating that the protection from slavery gives rise to *erga omnes* obligations, the ICJ determined that slavery is a *jus cogens* crime. As such, the prohibition of slavery represents the top of the international legal hierarchy. It protects the most essential interests of the international community as a whole.<sup>1353</sup> As a *jus cogens* norm, the prohibition of slavery does not allow for any derogation.<sup>1354</sup> States have a duty to prosecute and extradite. These obligations apply universally and states have universal jurisdiction. Statutes of limitations, immunities and the defence of superior orders are not applicable.<sup>1355</sup>

McDougall stressed that

“modern prohibitions against slavery allow for pure universal jurisdiction over any State or non-State actor in any case involving slavery or the slave trade. This status may be particularly useful in prosecuting individual cases of sexual slavery committed during armed conflict, as the prosecution in such a case need not establish the existence of State involvement or acquiescence, [the extent to which the laws or practices of any State may have sanctioned the act,] the existence of a widespread or systematic pattern of abuse, or any nexus between the crime and an armed conflict.”<sup>1356</sup>

<sup>1350</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 30.

<sup>1351</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application, 1962), Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3, (1970) 9 ILM 227, ICGJ 152 (ICJ 1970) (05 February 1970) 32, para 34.

<sup>1352</sup> M Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1997) 59 (4) *Law and Contemporary Problems* 63.

<sup>1353</sup> Mitchell (n 264).

<sup>1354</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3); Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 art 53.

<sup>1355</sup> Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (n 1352); United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 36-37.

<sup>1356</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 37.

Therefore, “[t]he international crime of slavery, including sexual slavery, is a particularly important and useful basis for addressing egregious acts of violence committed against women in armed conflict”.<sup>1357</sup>

Against this background, it can be argued that, in addition to founding their awareness of the crime of forced marriage on the Final Report and in addition to adopting its examples and terminology, the Women’s Caucus might also have adopted the strategy suggested by McDougall regarding the criminalisation of forced marriage. Rather than being founded on a misunderstanding of the crime or a misevaluation of the dominance of its sexual or non-sexual elements, the understanding of forced marriage as a form of (sexual) slavery appears to have been a strategic decision. Comparable to discussions about the criminalisation of rape as torture,<sup>1358</sup> defining forced marriage as the *jus cogens* crime of slavery emphasises the seriousness of the conduct, increases the chances of prosecution and supersedes the principle of national sovereignty.<sup>1359</sup> The latter would be of particular relevance considering the Arab block’s concerns regarding the criminalisation and definition of sexualised crimes.

Therefore, based on the writings of the Women’s Caucus rather than on accounts of the ICC negotiations, the Caucus’ understanding of the crime of forced marriage as a form of sexual slavery can be understood as an attempt to keep slavery alive as a subject by adapting the name and definition to make room for new insights and perspectives generated by new contexts. Making use of the historical background of the struggle for the abolition of slavery, it then becomes a well-established label that signifies something that everybody opposes and no one would openly defend; something that is obviously wrong. As discussed in Chapter 5, this labelling, however, cannot be considered a fair and objective description of the situation in which victims of forced marriage find themselves.

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<sup>1357</sup> United Nations Commission on Human Rights ‘Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict’ (n 3) para 112.

<sup>1358</sup> For more information on rape as a *jus cogens* crime see for example Mitchell (n 264).

<sup>1359</sup> Mitchell (n 264).

Brunnée and Toope (n 138): This indicates that the Women’s Caucus might have been driven by the logic of consequences in defining forced marriage as a form of sexual slavery. It might have been in the Caucus’ interest to establish forced marriage as a serious crime covered by a non-derogable legal norm.

## *8.5 Conclusion*

Chapter 7 introduced the Women's Caucus' understanding of forced marriage as a form of sexual slavery. Based on this, Chapter 8 analysed the examples, terminology and sources of information the Caucus used in relation to forced marriage. Through this analysis, a deeper understanding of the Women's Caucus' interpretation of the conduct was gained.

The categorisation of sexual slavery and, by extension, forced marriage as a form of gender violence that can include acts of sexual and non-sexual violence demonstrates that the Caucus did not see forced marriage as a purely sexual crime. However, the examples used in relation to forced marriage show that the Caucus overemphasised the sexual elements of the crime. Like the UN Special Rapporteur on Violence against Women, its Causes and Consequences, the Women's Caucus mentioned forced marriage in the same breath as the situation of the comfort women during the Second World War in Japan. Even though parallels can be drawn between the two, the crucial difference is that forced wives have to provide sexual and domestic services exclusively to their forced husbands while comfort women had to sexually serve many men. The situation of the comfort women was mentioned as an example of institutionalised sexual slavery, and so were the rape camps established during the war in the former Yugoslavia. Here, the misleading emphasis on the sexual elements of gender violence becomes even more obvious as even non-sexual components such as cooking and serving the captors were sexualised through the fact that they had to be carried out naked. In addition to the comfort women and the rape camps in the former Yugoslavia, the Women's Caucus also referred to Rwandan, Burmese, Liberian and Ugandan women's experiences of forced marriage. These examples show that forced marriage consists of sexual and non-sexual elements. However, especially with the Rwandan and Burmese example, an emphasis was placed on the sexual ones. During the Rwandan genocide and in Burma, 'marriage' was used as a euphemism for rape. In Rwanda, promises of marriage were used as a justification for rape. In Burma, rape is used to coerce women into marriage. The examples of forced marriage in Liberia and Uganda, in contrast, balance the relevance of the sexual and non-sexual elements of forced marriage.

In addition to the examples referred to, the Women's Caucus' terminology of 'forced temporary marriage' is comparable to that brought forward in the Final Report of

the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict.

Since the examples and terminology used by the Women's Caucus' appear to be largely based on the Final Report of the Special Rapporteur, it could be assumed that the Caucus also might have adopted the strategy for the criminalisation of forced marriage suggested by the Special Rapporteur. As such, the categorisation of forced marriage as a particular form of the *jus cogens* norm of slavery appears to have been a strategic decision that highlights the seriousness of the crime and facilitates prosecution.

This, however, stands in contrast to how the international community saw forced marriage at the time of the ICC negotiations. Forced marriage was simply seen as a sexual crime and what mattered were its sexual elements that made it the crime of sexual slavery. Participants of the ICC negotiations claimed that the Women's Caucus adopted this view.

Against the background of the international community's stand, few better alternatives than subsuming forced marriage under sexual slavery would have been likely to have emerged from the ICC negotiations. As discussed in Chapters 6 and 7, the mandate of the conference which restricted the creation of new crimes as well as the dynamics of the negotiations did not make a bigger step possible. The inclusion of the crime of sexual slavery in the ICC instruments is an important codification of a crime previously recognised under customary law but not yet mentioned in an international legal instrument.<sup>1360</sup> Forced marriage, in contrast, was less visible as a crime under International Law and therefore was not recognised as a crime in its own right. Additionally, the drafters wanted to avoid repetition and undue overlap.<sup>1361</sup> Since the difference between forced marriage and sexual slavery was not highly theorised, the former could have fallen victim to the resulting process of specification. Therefore, increased theorisation of forced marriage in times of armed conflict is important to ensure sensitive interpretations of the crime by the ICC.<sup>1362</sup> It also can be argued that the drafters resorted to the use of constructive ambiguity by defining forced marriage as a form of sexual slavery. This way, they left open opportunities for a positive and precedent-setting approach as taken by the Special Court for Sierra Leone.

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<sup>1360</sup> Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 623.

<sup>1361</sup> Interview 19 (n 483); Oosterveld, 'Sexual Slavery and the International Criminal Court' (n 50) 623.

<sup>1362</sup> Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' [2005] Harvard Human Rights Journal 55, 58.

## **9 The Arab block's proposal**

### *9.1 Introduction*

Chapter 9 presents another, more detailed, snapshot of a specific part of the ICC negotiations already mentioned in Chapter 7. It explores the Arab block's<sup>1363</sup> concerns regarding the definitions of rape and sexual slavery as crimes against humanity. From its proposals discussed in Chapter 7 it becomes clear that it aimed to protect religious principles, cultural norms and national laws.<sup>1364</sup> Chapter 9 addresses Research Questions 2<sup>1365</sup> and 3<sup>1366</sup> by exploring which religious principles, socio-cultural norms and national laws exactly the Arab block might have wanted to protect.

After establishing that marital rape is not criminalised under the Arab block's national laws, the chapter analyses the ideal of obedient wives and the understanding of rape as an honour crime as two possible reasons for this. Linked to religious principles, socio-cultural norms and national laws related to the ideal of obedient wives are discussions about societal structure and cohesion, social engineering, external impositions of legal reform processes and negotiations of women's rights and sexualised violence as proxy debates for governments' broader geopolitical and economic concerns. Linked to religious principles, socio-cultural norms and national laws related to the understanding of rape as an honour crime are discussions about mediation and Shari'a courts as ways to address sexualised violence, social engineering, external impositions of legal reform processes and rape-marriage policies. After focusing on the crime of rape, Chapter 9 then turns to the Arab block's concerns regarding the ICC definition of sexual slavery. It argues that the Arab block was aware that certain marriage rights, duties and obligations might be interpreted to be an exercise of powers attaching to the right of ownership and therefore the Arab block sought to exclude them from the ICC definition of sexual slavery. Marriage rights, duties and obligations that are explored in this context are the accepted language of

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<sup>1363</sup> Interview 1 (n 730); Interview 14 (n 750): According to other states' delegates, the Arab block was led by Syria and Qatar. As mainly oil producing states, the states constituting the Arab block had the means to invest in the ICC negotiations. Therefore, they were more organised than other states that might have held opinions contrary to that of the majority of delegations at the ICC negotiations. Consequently, the Arab block could make its voice heard.

<sup>1364</sup> PrepCom2 'Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)' (n 66).

<sup>1365</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1366</sup> Research Question 3 reads: What was the driving actors' understanding of war rape and forced marriage?

a marriage offer, understandings of dowry and maintenance, irregular and temporary marriages and the ideal of obedient wives. Comparisons between these and forced marriages in times of armed conflict are established. As it becomes apparent that the Arab block's proposal did not target the indirect criminalisation of forced marriage as a form of sexual slavery under the ICC instruments, part 9.3 also analyses religious principles, socio-cultural norms and national laws that supported this step. Before concluding, Chapter 9 historically contextualises the Arab block's opposition in the ICC negotiations by drawing parallels to the Beijing Conference.

*9.2 “Nothing in [the elements of the crime of rape] shall affect natural and legal marital sexual relations in accordance with religious principles or cultural norms in different national laws.”<sup>1367</sup>*

Even though the Arab block criminalised rape in general, only Article 279 of the Qatari Penal Code explicitly recognises “the relative, the guardian, the caretaker or the servant” as perpetrators of rape, and imposes a harsher sentence on them than on other rapists.<sup>1368</sup> In Bahrain, Iraq, Lebanon, Libya, Oman, Saudi Arabia, Syria and the United Arab Emirates, in contrast, there is no law covering marital rape. In fact, only marital sexual intercourse is considered lawful.<sup>1369</sup> The non-criminalisation of marital rape could explain why the Arab block submitted a proposal to the same effect under International Criminal Law.<sup>1370</sup>

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<sup>1367</sup> PrepCom2 ‘Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)’ (n 66) art 7(1)(g)(1)(4).

<sup>1368</sup> Qatari Penal Code (n 20).

<sup>1369</sup> Bahrain Penal Code (n 20) art 339, art 344-348; The Criminal Act of 1991 (Sudan) (n 20) art 149(2); Iraqi Penal Code No. 111 (n 20); The Libyan Penal Code (n 20); Omani Penal Code (n 20); Khalaf (n 20) 6; Freedom House, ‘Syria’ in Julia Breslin and Sanja Kelly (eds), *Women’s Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010) <[http://www.freedomhouse.org/sites/default/files/inline\\_images/Syria.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Syria.pdf)> accessed 28 March 2014; Wael B Hallaq, *An Introduction to Islamic Law* (5<sup>th</sup> edn, Cambridge University Press 2009) 133; U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, ‘2009 Human Rights Report: Saudi Arabia’ (n 20); U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, ‘2009 Human Rights Report: United Arab Emirates’ (2010) <<http://www.state.gov/j/drl/rls/hrrpt/2009/nea/136082.htm>> accessed 01 April 2014.

<sup>1370</sup> Interview 12 (n 743).

Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of consequences and/or practicality. Based on their national laws, it might have been in its interest to make

### 9.2.1 Obedient wives

The non-criminalisation of marital rape under the Arab block's national laws is in line with the ideal that "a woman must always be obedient [and sexually available] to her husband, an Islamic legal principle"<sup>1371</sup> "initially taken from a 19<sup>th</sup> century European model".<sup>1372</sup> Accordingly, "the husband [...] has more extensive rights [in regards to marital sexual relations] than his wife".<sup>1373</sup> Husbands' more extensive rights, authority and power on the one hand can be understood as legal discrimination against wives supported by religious and socio-cultural values and norms. The result is wives' subordination which can include being obedient and in a servile status to their husbands. On the other hand, it is argued that hierarchies are a necessary element of any group structure to ensure cohesion rather than an indicator of men's superiority. The need for clearly identified and differentiated gender roles is justified by the wish to enhance the success, growth, strength and stability of the family<sup>1374</sup> and, by extension, of society, for "a family is [the nucleus of Islamic society,<sup>1375</sup>] the prototype of the nation".<sup>1376</sup>

Attempts to alter the distinct gender roles within the family structure that are required by religious and socio-cultural values and norms could therefore be perceived not only as legal reform, but as social engineering and coercion to alter religious practices and beliefs on which Islamic identity is based.<sup>1377</sup>

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marital sexual intercourse consensual by definition. The Arab block might also have acted based on what it perceived to be common sense grounded in its national laws.

<sup>1371</sup> Doumato (n 75) 12.

<sup>1372</sup> Hallaq, *An Introduction to Islamic Law* (n 1369) 121.

<sup>1373</sup> Wael B Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 278-279; See also Ahmed Shukri, *Muhammedan Law of Marriage and Divorce* (Colombia University Press 1917) 21.

<sup>1374</sup> Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 90; John E Esposito, *Women in Muslim Family Law* (Syracuse University Press 1982) 15; Jamal J Nasir, *The Status of Women Under Islamic Law and Under Modern Islamic Legislation* (Graham and Trotman 1990) 3.

<sup>1375</sup> Abdur Rahman I Doi, *Women in Shari'ah (Islamic Law)* (2<sup>nd</sup> edn, Ta-Ha Publishers 1989) 32; See also ICESCR (n 99) art 10(1) which states that "the family [...] is the natural and fundamental group unit of society".

<sup>1376</sup> Hallaq, *An Introduction to Islamic Law* (n 1369) 120.

Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of consequences in protecting the ideal of obedient wives. Protecting unequal gender relations might have been in the Arab block's interest as it arguably enhances the success, growth, strength and stability of the family and society.

<sup>1377</sup> Baderin (n 1374) 133-138.

Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of consequences in protecting unequal gender relations within the family. It might have been in its interest to protect its collective identity.

The Arab block's dissent from developments in International Criminal Law regarding sexualised crimes can also be understood as resistance towards the external imposition of a legal reform process that should have been initiated by national governments, limiting the ways through which states can exercise power in the domestic sphere. Making governments appear out of control, this could give rise to opposition.<sup>1378</sup>

This indicates that negotiations of women's rights or sexualised violence are rarely solely about sexuality, sexual agency and gender but

“serve as proxy debates for governments' broader geopolitical and economic concerns. In many instances, strong language related to gender and women's experience is negotiated and traded off as a result of bilateral and multilateral security and terrorism alliances, foreign aid relations, global debt imbalances, and the legacies of colonialism, war, conflict and political/economic transition. Governments may support or oppose sexuality-related positions because they are being pressured by donor countries, because of regional and political allegiances or aspirations, or, in fact, to demonstrate that they can operate free of these political pressures.”<sup>1379</sup>

This also affects the space for advocacy and how organisations set their priorities, measure their goals and develop ideas to counter political realities and risks.<sup>1380</sup> Nevertheless, many women's rights advocates see the articulation of women's rights within the international sphere “not only as a goal in itself, but as potentially affecting national level policies in ways that support their political agendas.”<sup>1381</sup> Therefore, their aim is social engineering.

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<sup>1378</sup> Interview 3 (n 726); Interview 18 (n 5).

Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of consequences in opposing a more progressive rape definition as this would have imposed a legal reform process on the Arab block that should have been initiated by national governments. It might have been in the Arab block's interest to prevent governments to appear pushed about to avoid opposition.

<sup>1379</sup> Rothschild (n 34) 107.

<sup>1380</sup> Rothschild (n 34) 16.

<sup>1381</sup> Rothschild (n 34) 108.



### 9.2.2 Honour

The non-criminalisation of marital rape is also in line with the Arab block's patriarchal understanding of rape as an honour crime.<sup>1382</sup> Article 21(1)(f) of the Iraqi Penal Code, for example, establishes rape as a "dishonourable offence".<sup>1383</sup> The Omani Penal Code mentions rape under "Crimes Prejudicial to Honour and Public Morals".<sup>1384</sup> Similarly, the Libyan Penal Code lists rape under "Offences against Freedom, Honour and Morals".<sup>1385</sup> The Qatari Penal Code includes rape in "Chapter 4 Adultery and Crimes of Honour".<sup>1386</sup> Both the non-criminalisation of marital rape and the understanding of rape as an honour crime reflect and reinforce the trivialisation of rape which could explain how it is addressed legally.

Like other honour crimes, sexualised violence is considered a private matter often dealt with through mediation between the people concerned and interested, such as the perpetrator and survivor, as well as their families, rather than in court.<sup>1387</sup> Therefore dispute resolution depends on decisions made by the family, or by religious or tribal authorities often resulting in judgments detrimental to women.<sup>1388</sup> A similar outcome is to

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<sup>1382</sup> Bahrain Penal Code (n 20) art 344, art 346; The Criminal Act of 1991 (Sudan) (n 20) art 149(1); Iraqi Penal Code No. 111 (n 20) art 21(1)(f), art 393(1); The Libyan Penal Code (n 20) art 407; Omani Penal Code (n 20) art 218(1); Qatari Penal Code (n 20) art 279; Centre on Law and Globalization (n 428); Khalaf (n 20) 6; United Nations Commission on Human Rights 'Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict' (n 3) para 24; U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, '2009 Human Rights Report: Saudi Arabia' (n 20); U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, '2009 Human Rights Report: Syria' (n 20).

For a more nuanced discussion of the Arab block's national rape definitions see section 4.2.7. For further elaboration on the understanding of rape as an honour crime see section 4.2.1.

Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of appropriateness. It might have followed what social norms deemed right, in this example the understanding of rape as an honour crime.

<sup>1383</sup> Iraqi Penal Code No 111 (n 20) chapter three, section 1.

<sup>1384</sup> Omani Penal Code (n 20) title v.

<sup>1385</sup> The Libyan Penal Code (n 20) book III, title III.

<sup>1386</sup> Qatari Penal Code (n 20).

<sup>1387</sup> Bahrain Penal Code (n 20) art 339, art 344-348; The Criminal Act of 1991 (Sudan) (n 20) art 149(2); Iraqi Penal Code No 111 (n 20); The Libyan Penal Code (n 20); Omani Penal Code (n 20); Freedom House, 'Syria' (n 1369) 2; Hallaq, *An Introduction to Islamic Law* (n 1369) 133; Khalaf (n 20) 6; U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, '2009 Human Rights Report: Saudi Arabia' (n 20); U.S. Department of State: Bureau of Democracy, Human Rights, and Labor, '2009 Human Rights Report: United Arab Emirates' (n 1369).

<sup>1388</sup> Dunya Ahmed Abdulla Ahmed, 'Bahrain' in Julia Breslin and Sanja Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010) <[http://www.freedomhouse.org/sites/default/files/inline\\_images/Bahrain.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Bahrain.pdf)> accessed 17 March 2014; Huda Ahmed, 'Iraq' in Julia Breslin and Sanja Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010) 6, 12, 14

be expected when cases of sexualised violence are dealt with in Shari'a courts.<sup>1389</sup> These patriarchal all-male religious courts arbitrarily decide related matters on a case-by-case basis. Drawing on Islamic sources, judges who are often conservative religious scholars with little or no formal legal training use their own discretion to interpret Islamic legal texts.<sup>1390</sup> They accord to the law's effects a character of sanctity.<sup>1391</sup> Consequently, even if a dispute comes before a court, the court has to apply the law which, in the examples of the Arab block, is based on patriarchal religious principles<sup>1392</sup> which translate themselves into patriarchal court systems and socio-cultural norms that, again, feed back into law-making processes.

Since sexualised violence is often dealt with outside domestic courts, the Arab block supposedly would not want them to come before an international court. This would drag sexualised violence from the private into the public sphere. As a public matter, sexualised violence would be addressed by different actors. These may recognise

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<[http://www.freedomhouse.org/sites/default/files/inline\\_images/Iraq.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Iraq.pdf)> accessed 18 March 2014; Doumato (n 75).

<sup>1389</sup> Ahmed, 'Bahrain' (n 1388) 2, 4, 8; Bahrain Center for Human Rights, 'Family Law in Bahrain' (10 February 2014) 7  
<<http://www.bahrainrights.org/sites/default/files/BCHR%20Report%20on%20Family%20Law%20in%20Bahrain.pdf>> accessed 17 March 2014.

<sup>1390</sup> Ahmed, 'Bahrain' (n 1388); See also Doumato (n 75): Civil, commercial and criminal matters as well as family-related matters of non-Muslims are dealt with by civil law courts.

<sup>1391</sup> Ahmed, 'Bahrain' (n 1388) 2, 4, 8; Bahrain Center for Human Rights (n 1389) 7.

<sup>1392</sup> Constitution of the State of Bahrain (26 May 1973) <<http://confinder.richmond.edu/admin/docs/Bahrain.pdf>> accessed 17 March 2014; Khalaf (n 20) 4; See also The Constitution of the Republic of the Sudan (1998) art 4 <<http://www.sudanembassy.ca/Docs/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20THE%20SUDAN%201998.pdf>> accessed 28 March 2014; Constitution of Saudi Arabia (1992) art 1 <[http://www.servat.unibe.ch/icl/sa00000\\_.html](http://www.servat.unibe.ch/icl/sa00000_.html)> accessed 28 March 2014; The Constitution of the State of Kuwait (1962) art 2 <<http://www.crsk.edu.kw/Photo/dastor.pdf>> accessed 21 March 2014; Constitution of Syria (1964) art 3(2) <[http://www.law.yale.edu/rcw/rcw/jurisdictions/asw/syrianarabrep/syria\\_constitution.htm](http://www.law.yale.edu/rcw/rcw/jurisdictions/asw/syrianarabrep/syria_constitution.htm)> accessed 28 March 2014; Constitution of the United Arab Emirates (1996) art 7 <<http://www.refworld.org/pdfid/48eca8132.pdf>> accessed 28 March 2014; Iraqi Constitution (2005) art 2 <<http://www.wipo.int/edocs/lexdocs/laws/en/iq/iq004en.pdf>> accessed 18 March 2014; Oman's Constitution of 1996 with Amendments through 2011 art 2 <[https://www.constituteproject.org/constitution/Oman\\_2011.pdf](https://www.constituteproject.org/constitution/Oman_2011.pdf)> accessed 21 March 2014; Permanent Constitution of the State of Qatar (2003) art 1 <[http://www.law.yale.edu/rcw/rcw/jurisdictions/asw/qatar/qatar\\_constitution.doc](http://www.law.yale.edu/rcw/rcw/jurisdictions/asw/qatar/qatar_constitution.doc)> accessed 21 March 2014; In the Arab block, religious principles are the basis for national laws including personal status laws which include marriage laws. This becomes clear when considering that in most of these states' constitutions – with Lebanon being an exception – "Islamic Sharia (Islamic Law) [is recognised as] 'a main source' of legislation". In Lebanon, international treaties take precedence over national laws.

sexualised violence as a wrong, resulting in law reform that could be perceived again as a form of social engineering and unwanted interference in national matters.<sup>1393</sup>

One outcome of the mediation that follows instances of extra-marital sexual violence is the marriage between the rapist and the rape survivor. According to Bahraini, Iraqi, Lebanese, Libyan, Sudanese and Syrian law<sup>1394</sup> as well as socio-cultural norms, the rapist would save the survivor's honour through marrying her as a social redress.<sup>1395</sup> In Bahrain, the husband may later divorce his wife and consequently not only avoid punishment for rape but also his conjugal responsibilities such as financially supporting his wife and providing housing for her.<sup>1396</sup> Effectively sentencing the rape survivor to at least three years of marriage to her rapist, Article 398 of the Iraqi Penal Code establishes that

“[l]egal proceedings will resume or the sentence will be reinstated, according to the circumstances if such marriage ends in divorce brought about by the husband without legal justification or in a divorce ordered by the court for wrongs committed by the husband or for his bad behavior within 3 years following the cessation of the proceedings. The public prosecutor, the accused, the victim or any person who has an interest in the proceedings may, according to the circumstances, make application for the proceedings, investigation, procedures or execution of the sentence to be stopped or for their resumption or for the reinstatement of the sentence.”<sup>1397</sup>

Rape-marriage policies highlight a male, victim-centred and collective understanding of rape. It is the survivor's honour – and by extension the honour of her family – that needs to be saved rather than the perpetrator's breach of the law that needs to be prosecuted.

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<sup>1393</sup> Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of consequences. It might have been in its interest not to address sexualised violence in international courts as this would have resulted in domestic law reform.

<sup>1394</sup> Bahrain Penal Code (n 20) art 353; Interview 14 (n 750); Iraqi Penal Code No 111 (n 20) art; Khalaf (n 20) 6; Freedom House, 'Syria' (n 1369) 12; Alison Pargeter, 'Libya' in Julia Breslin and Sanja Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010) 13 <[http://www.freedomhouse.org/sites/default/files/inline\\_images/Libya.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Libya.pdf)> accessed 21 March 2014; Organisation for Economic Co-operation and Development, 'Social Institutions and Gender Index: Sudan' (2012) <<http://genderindex.org/country/sudan>> accessed 28 March 2014.

Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of practicality and appropriateness. It might have followed what it considered to be common sense grounded in national laws and/or what social norms deemed right.

<sup>1395</sup> Pargeter (n 1394) 13.

<sup>1396</sup> Bahrain Center for Human Rights (n 1389).

<sup>1397</sup> Iraqi Penal Code No 111 (n 20).

The discussion in part 9.2 showed that marital rape is not criminalised under national laws in the states constituting the Arab block. This could explain the group's proposal to make marital sexual intercourse consensual by definition in the ICC instruments. Digging deeper, it became apparent that the national non-criminalisation of marital rape is connected to religious principles, socio-cultural norms and national laws related to the ideal of obedient wives and understandings of rape as an honour crime. The ideal of obedient wives creates distinct gender roles. Attempts to alter these could be seen as social engineering and an imposition of a legal reform process. Therefore, these attempts could be quashed. Furthermore, they are quashed by geopolitical and economic concerns. Questions of honour are considered private and therefore are rarely dealt with in court. A court case would increase publicity and convey importance to an issue. This might lead to demand for reform which might again be perceived as attempts of social engineering and unwelcome interference in national matters. Rape-marriage policies, instead, are an easy and quiet solution to re-establish a woman's honour and that of her family.

*9.3 "Powers attaching to the right of ownership do not include rights, duties and obligations incident to marriage between a man and a woman"<sup>1398</sup>*

The following paragraphs address the Arab block's concerns regarding the ICC definition of sexual slavery. They first analyse the accepted language of a marriage offer as well as understandings of payments of dowry and maintenance before they examine irregular and temporary marriages as marriage rights, duties and obligations that might be interpreted to be an exercise of powers attaching to the right of ownership and therefore amount to sexual slavery. In a third step, the ideal of obedient wives recurs, this time in the context of the Arab block's concerns regarding the ICC definition of sexual slavery rather than rape. Comparisons are established to forced marriages in times of armed conflict. While the first three sections of part 9.3 explore marriage rights, duties and obligations in the states constituting the Arab block that bear resemblance to situations of sexual slavery

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<sup>1398</sup> PrepCom2 'Proposal Submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates Concerning the Elements of Crimes against Humanity (09 December 1999)' (n 66).

and forced marriage in times of armed conflict,<sup>1399</sup> section 9.3.4 discusses religious principles, socio-cultural norms and national laws of the Arab block that support the indirect criminalisation of forced marriage under the ICC instruments.

### *9.3.1 The language of marriage offers, and understandings of dowry and maintenance payments*

The language of a marriage offer and understandings of payments of dowry and maintenance are rights, duties and obligations related to marriage that might be comparable to forced marriage and/or interpreted to be an exercise of powers attaching to the right of ownership and therefore amounting to sexual slavery.

The payment of dower by the groom to the bride rather than her marriage guardian can be understood as an action making her a party to the marriage contract. Based on this, the marriage contract cannot be considered a sale.<sup>1400</sup> In contrast, the language of the offer of marriage shows that marriage is conceived at least by some schools of Islamic jurisprudence as a property transaction. Terms such as ‘gifting’, ‘selling’ and ‘surrendering ownership’ are accepted, invoking concepts of ownership and slavery.<sup>1401</sup> The definition of dower as “an exchange for the vulva”<sup>1402</sup> makes this even more graphic. It is this ownership by the husband of the wife’s vulva that makes sexual intercourse lawful. Following on from this, the payment of maintenance ensures the husband’s exclusive use of his wife’s vulva.<sup>1403</sup> The use of the wife’s vulva with or without the wife’s consent could explain the Arab block’s proposal to disconnect marital sexual intercourse from the crime of rape. The payment of maintenance can also be understood as an exchange or compensation for the husband’s right to confine his wife to the house for his sexual gratification. This understanding verges closely on what constitutes the crime of sexual slavery. Moreover, it can be compared to situations of forced marriage in times of armed

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<sup>1399</sup> Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of appropriateness in the sense that it did what social norms deemed rights.

<sup>1400</sup> Esposito (n 1374) 24.

<sup>1401</sup> Hallaq, *Shari’a: Theory, Practice, Transformations* (n 1373) 273-274; Shukri (n 1373) 43-44: Others schools of Islamic jurisprudence adopt a more literal and formal approach and argue that marriage is an act through which two people are brought, fitted and paired together based on mutual suitability.

<sup>1402</sup> Colin Imber, *Ebu’s-su’ud: The Islamic Legal Tradition* (Edinburgh University Press 1997) 174

<sup>1403</sup> Imber (n 1402) 183.

conflict where attaching the label ‘wife’ to a woman indicates her belonging to her forced husband and assures his exclusive sexual access for which he in turn supports the woman materially.

### 9.3.2 Irregular and temporary marriages

To prevent extra-marital sexual relations, irregular marriages<sup>1404</sup> are recognised as situations of quasi-ownership of the vulva.<sup>1405</sup> Here, the wife has the right to payments of dower, but not to maintenance. Therefore, even though the husband owns her vulva, he has no right to exclusive use. The same holds true in temporary marriages.<sup>1406</sup> In both situations, but especially in temporary marriages, it can be asked whether the payment of dower is more of a purchase price rather than a gift made by a man to his bride. Also, it could be argued that, without receiving maintenance, without mutual rights of inheritance, without rights to support if the wife becomes pregnant and without any divorce rights, the wife is in a vulnerable position that can easily be exploited by her husband.

A forced marriage in times of armed conflict can be understood as irregular due to the lack of involvement of a marriage guardian, official witnesses and proper offer and acceptance. In regard to the dissolution of irregular and forced marriages, in neither situation does the woman have extensive protection. Since forced marriages are formed informally, there are no formal divorce proceedings. Moreover, it has to be kept in mind

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<sup>1404</sup> Doi, *Women in Shari’ah (Islamic Law)* (n 1375) 46-53; Esposito (n 1374) 13-19; Hallaq, *An Introduction to Islamic Law* (n 1369) 115, 126; Hallaq, *Shari’a: Theory, Practice, Transformations* (n 1373) 271; Shukri (n 1373) 51-52: Irregular marriages are seen by Islamic law as good in their foundations but unlawful in their attributes. They are irregular because they lack a formality that may be corrected, for example marriages without witnesses, or because of an impediment which can be removed for example when the husband already has four wives. In the case of marriages without witnesses, prolonged and continuing cohabitation is permitted as proof of marriage. An irregular marriage has no legal effect until the marriage is consummated and even afterwards, the rights of the spouses are limited. The wife has the right to payments of dower, but not of maintenance. There are no mutual rights of inheritance. To dissolve the marriage, a single verbal declaration of divorce by one of the partners is sufficient.

<sup>1405</sup> Imber (n 1402) 174-175, 189; Shukri (n 1373) 21.

<sup>1406</sup> Ahmed, ‘Iraq’ (n 1388) 10, 12-13; Nasir (n 1374) 16-17: A temporary marriage allows an unmarried woman to marry a man, whether already married or not, for a certain period of time in exchange for money. These temporary marriages leave the woman without protection as only the man has the right to dissolve the marriage, unless there was a prior agreement between them. Additionally, the woman has no right to support if she becomes pregnant. While Shiite clerics who encourage the practice argue that it prevents adultery and helps widows and poor women, critics see it as a form of prostitution. Understanding the aim of marriage to be the founding of a family, Sunni jurists agree that a marriage contract must not include or imply any time limit. Therefore, they do not consider temporary marriages to be proper marriages because they do not, as said above, establish maintenance and inheritance rights.

that a split from her forced husband may be socio-economically detrimental to the forced wife as it is likely that she is excluded from her family and community and may have no other means of support. Since forced marriage in times of armed conflict can be seen as a form of irregular, it would be lawful according to norms of the Arab block. By disconnecting marriage rights, duties and obligations, including irregular marriages, from sexual slavery, forced marriage as a form of irregular marriage would not be criminalised under International Law either. It has to be noted, however, that irregular marriages differ from forced marriages in regard to payment of dower. While in irregular marriages, the woman has the right to payments of dower, but not of maintenance, it is the other way round in forced marriages. Women are abducted and given in marriage to a fighter in exchange for his services to a fighting group. The woman does not receive anything from the man in 'exchange for her vulva'. In marriage, however, she is materially supported by the forced husband.

Comparing forced marriage to temporary marriage, the man holds the exclusive power to dissolve the marriage in both situations. Highlighting differences, the label of marriage attached to forced marriages in situations of armed conflict and temporary marriages serves different purposes. In the case of the latter, in conformity with religious, socio-cultural and legal norms and rules, it makes sexual intercourse lawful. The fact that the woman does not have any rights to support if she becomes pregnant shows that these unions are not aimed at serving any reproductive purpose, but pure sexual gratification. In the case of forced marriages, the label 'wife' attached to an abductee manipulates the woman into loyalty towards her forced husband and the fighting group. As it does not only legitimise sexual intercourse but also implies non-sexual exploitation, it has broader implications than in temporary marriages. The fact that a woman's status and her position within the family and the fighting group increases after she gave birth as well as the acknowledgement of paternity from the forced husband reveals that reproduction rather than pure sexual gratification which could be achieved through rape is an important element in forced marriages. In addition to marriage and parenthood, forced marriages enable forced husbands to fulfil the masculine ideal of providing for, and protecting, their family.

### 9.3.3 Obedient wives

The ideal of obedient wives discussed above in relation to the Arab block's proposal on the ICC definition of rape may also have been one of the religious principles, socio-cultural norms and national laws the Arab block wanted to protect by disconnecting marriage rights, duties and obligations from the ICC definition of sexual slavery as an exercise of powers attaching to the right of ownership.<sup>1407</sup>

Contrary to the principles of Islam and the understanding that one should serve God alone<sup>1408</sup> as well as to national prohibitions of slavery,<sup>1409</sup> the ideal of obedient wives is linked to a view of women as men's property, overlooking considerations of autonomy. This could be interpreted to result in a state of ownership or servitude. Consequently, the ideal of obedient wives could be considered a breach of national prohibitions of slavery.

The ideal of obedient wives also resonates with situations of forced marriage in times of armed conflict. Forced wives have to be submissive to the authority of their forced husbands. Forced wives have to serve their forced husbands sexually and otherwise. Disobedience is severely punished.

So far, Part 9.3 has shown that the language of marriage offers as well as understandings of dowry and maintenance were national normative structures that the Arab block might have wanted to protect by proposing to disconnect marriage rights, duties and obligations from the crime of sexual slavery as they can be linked to the notion of ownership and therefore constitute the first element of the crime of sexual slavery. The same holds true for irregular and temporary marriages. In both instances, the payment of dowry could be seen as purchasing ownership of the woman's vulva. When considering that temporary marriages do not create any rights for the woman and that temporary

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<sup>1407</sup> Brunnée and Toope (n 138): This indicates that the Arab block might have been driven by the logic of consequences. It might have been in its interest to disconnect marriage relations from powers attaching to the right of ownership to protect domestic marriage rights, duties and obligations.

<sup>1408</sup> Ahmed, 'Bahrain' (n 1388) 11; Baderin (n 1374) 87.

<sup>1409</sup> The Constitution of the Republic of the Sudan (n 1392) art 20; Constitution of the United Arab Emirates (n 1392) art 34(2); Iraqi Constitution (n 1392) art 37(3); The Libyan Penal Code (n 20) art 425; Qatari Penal Code (n 20) art 321; Haya al-Mughni, 'Kuwait' in Julia Breslin and Sanja Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010) 10 <[http://www.freedomhouse.org/sites/default/files/inline\\_images/Kuwait.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Kuwait.pdf)> accessed 21 March 2014; Rafiah al-Talei, 'Oman' in Julia Breslin and Sanja Kelly (eds), *Women's Rights in the Middle East and North Africa: Progress Amid Resistance* (Freedom House/ Rowman & Littlefield Publishers 2010) 8 <[http://www.freedomhouse.org/sites/default/files/inline\\_images/Oman.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/Oman.pdf)> accessed 21 March 2014; Doumato (n 75) 11; Freedom House, 'Syria' (n 1369) 10.



marriages are comparable to prostitution, the link to sexual slavery becomes even more obvious. The ideal of obedient wives also puts women in a servile statutes to man. Therefore, it could be seen as amounting to sexual slavery.

In addition to demonstrating that irregular marriages, the ideal of obedient wives and understandings of maintenance can amount to an exercise of powers attaching to the right of ownership, a link can be established to forced marriage in times of armed conflict. Forced marriages are formed without any formality such as the presence of witnesses. Forced wives have to obey their forced husband. They are expected to have an exclusive relationship and receive material support.

#### *9.3.4 Religious principles, cultural norms and national laws that support the criminalisation of forced marriage in times of armed conflict*

Even though the Arab block's proposal invokes issues related to marriage and parallels can be drawn between certain rights, duties and obligations related to marriage in the states constituting the Arab block and forced marriage in times of armed conflict, the Arab block's proposal did not target the indirect criminalisation of forced marriage in times of armed conflict under the ICC. While the meanings of the payment of maintenance, irregular marriages, and the male ideal of obedient wives can be interpreted to include elements of forced marriage and therefore may give rise to opposition towards its international criminalisation, other religious principles, socio-cultural norms and national laws also support this step.

According to the laws of the Arab block, a woman may not be forced into marriage and must always agree with the final decision to bring the marriage contract into effect.<sup>1410</sup> Coercion constitutes a ground for seeking annulment of marriage in a court.<sup>1411</sup>

If a woman's absence of consent to marriage is understood to make the marriage bad in its foundation, forced marriages in times of armed conflict would be void.<sup>1412</sup>

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<sup>1410</sup> al-Mughni (n 1409) 8, 10.

<sup>1411</sup> The Great Green Charter of Human Rights of the Jamahiriyan Era (1988) art 21 <<http://www.ilo.org/dyn/natlex/docs/SERIAL/57641/65910/F702695289/LBY57641.PDF>> accessed 21 March 2014; Hallaq, *Shari'a: Theory, Practice, Transformations* (n 1373) 275.

<sup>1412</sup> Doi, *Women in Shari'ah (Islamic Law)* (n 1375) 46-53; Esposito (n 1374) 18-19; Shukri (n 1373) 51-52: Void marriages are completely bad in their foundation for example because the partners are blood relatives, related by affinity or by fosterage as well as because of illicit sexual impropriety or religious differences.

However, if the spouses are unaware that their marriage is void, their sexual relationship is not classified as adultery. Based on socio-cultural norms, it would be considered as a quasi-marriage. However, since it is unrealistic to argue that a forced wife and her forced husband were not aware of the women's absence of consent to marriage, forced marriage in times of armed conflict would not fall under the category of a quasi-marriage.

In line with the potential understanding of forced marriages as void, Article 411 of the Libyan Penal Code explicitly criminalises "Abduction with Intention of Marriage". The provision states that "[w]hoever abducts an unmarried woman or detains her by force, threats, or deceit, with the intention of marrying her, shall be punished".<sup>1413</sup> Broadening the group of potential targets and acts, Article 412 further determines that "[w]hoever abducts a person, or detains a person by force, threats, or deceit, for the purpose of the commission of indecent acts, shall be punished".<sup>1414</sup> A similar provision exists in the Omani Penal Code.<sup>1415</sup> Article 296 of the Qatari Penal Code penalises "[b]ringing, exposing or accepting a male or a female in the purpose of sexual exploitation."<sup>1416</sup>

Even though only Article 411 of the Libyan Penal Code explicitly connects the crime of abduction and confinement to marriage, forced marriage as committed in armed conflicts could also fall under the other provisions outlined. Without a doubt, the crime includes sexual exploitation where different perpetrators can play different roles including bringing, exposing and accepting a woman for that purpose as determined in the Qatari Penal Code. The commission of indecent acts as referred to in the Libyan and Omani penal codes is more ambivalent. If forced marriage is seen as void because of the woman's absence of consent and if extra-marital sex is seen as an indecent act because it violates religious principles, socio-cultural norms and national laws, the sexual elements of forced marriage would be an indecent act. Since women are abducted and detained for the purpose of forced marriage and since one of the purposes of forced marriage is sexual exploitation, it could be argued that forced marriage in times of armed conflict would fall under Article 412 of the Libyan Penal Code and Article 218(2) of the Omani Penal Code.

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Void marriages do not award any rights or obligations to the spouses. They are null and void and therefore considered not to exist.

<sup>1413</sup> The Libyan Penal Code (n 20).

<sup>1414</sup> The Libyan Penal Code (n 20).

<sup>1415</sup> Omani Penal Code (n 20) art 218(2).

<sup>1416</sup> Qatari Penal Code (n 20).

#### *9.4 Contextualising the Arab block's opposition to the development of women's rights*

It has to be mentioned that the Arab block's opposition analysed in this chapter was not new. Striking parallels can be drawn between Cynthia Rothschild's analysis of the opposition raised at the Beijing Conference and against its Platform for Action<sup>1417</sup> and the ICC negotiations. At both occasions, Arab and Sub-Saharan countries as well as a Catholic alliance led by the Holy See and supported by Latin American countries portrayed women's rights advocacy and activism as a threat to country, community and family. Supporting the development of women's rights was viewed through a national and regional lens as officially approving sexual perversion including extra-marital sex. In Beijing, New York and Rome, opponents of the development of women's rights used rhetoric combining nationalism, traditionalism, moral absolutism and intolerance. National norms and rules were used as a defence against critique. They enabled states to position themselves as representing the uniting voice of the people in projecting a national (patriarchal) identity. Nationalism was used to defend the ideal identity of a state. In the name of divine moral values, local prejudices were endorsed by religion.<sup>1418</sup> "Conservative Muslim movements and authorities call[ed] for Western respect for tradition, as if there is a monolithic truth to that tradition".<sup>1419</sup> Those who were constructed as threatening national identity and independence were simultaneously constructed as foreign,<sup>1420</sup> as the 'other'. The "very postulation of an international order, in which universal and binding promises assume precedence over particularity and sovereignty, [was a potential affront to] the forces of nationalism."<sup>1421</sup> On this base, opponents raised questions regarding the (im)possibility of translating terms like 'sexual orientation' and 'gender', stated their incomprehension of those terms and concepts, and invoked the defence of human dignity. Misinformation about the meaning of such terms fuelled fears raised by the development of women's rights. Syria for example feared that women would stop bearing children if they had equality.<sup>1422</sup> As Rothschild demonstrated in regard to the Beijing Platform for Action and as was shown in this chapter using the example of the discussions of the crime of sexual

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<sup>1417</sup> Rothschild (n 34); See also Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court' (n 1362).

<sup>1418</sup> Rothschild (n 34).

<sup>1419</sup> Rothschild (n 34) 16.

<sup>1420</sup> Rothschild (n 34).

<sup>1421</sup> Rothschild (n 34) 44.

<sup>1422</sup> Rothschild (n 34).

slavery in the ICC negotiations, opponents brought up domestic norms and rules as a tool to close down discussions of women's rights. In trying to erase ideas, they facilitated their construction. Links were invoked and simultaneously, their existence was denied as if this would change the facts.<sup>1423</sup> Using the ICC negotiations of the elements of sexual slavery as an example, the Arab block's proposal establishes a connection between sexual slavery and marital rights, duties and obligation. At the same time, however, the Arab block denied this connection by stating that powers attaching to the right of ownership exclude marital rights, duties and obligation. This, however, does not change the fact that some marital rights, duties and obligations could amount to powers attaching to the right of ownership and therefore to slavery. By aiming to explicitly exclude marriage rights, duties and obligations from the crime of sexual slavery and therefore connecting, and at the same time disconnecting, domestic marriage practices and the crime of sexual slavery, women's rights were rendered both a "persistently forbidden subject, and a sensational and omnipresent threat".<sup>1424</sup> The urgency with which women's rights were circumscribed in the Beijing and ICC negotiations highlighted their potential power and use as a source of strength.<sup>1425</sup>

## 9.5 Conclusion

Chapter 9 explored the Arab block's concerns regarding the definitions of rape and sexual slavery as crimes against humanity that it voiced in a proposal submitted in the third PrepCom2 session in December 1999. Confirming Hypothesis 3<sup>1426</sup> and Peter Katzenstein's theory that national norms and rules shape international actors, their interests and actions, the Arab block's proposal makes clear that the group's aim was to protect certain religious principles, socio-cultural norms and national laws that might be interpreted to amount to crimes against humanity. Chapter 9 addressed Research Questions

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<sup>1423</sup> *ibid.*

<sup>1424</sup> Rothschild (n 34) 41.

<sup>1425</sup> Rothschild (n 34).

<sup>1426</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

2<sup>1427</sup> and 3<sup>1428</sup> by exploring what religious principles, socio-cultural norms and national laws exactly the Arab block might have wanted to protect.

In regard to the crime of rape, the chapter found that marital rape is not criminalised under national laws of the Arab block. This could explain the group's proposal to delink marital sexual intercourse and rape under the ICC instruments. The non-criminalisation of marital rape under the Arab block's national laws can be explained based on religious principles, socio-cultural norms and national laws related to the ideal of obedient wives and understandings of rape as an honour crime. Obedient wives have to be sexually available to their husbands, indicating that there is no rape in marriage. The understanding of rape as an honour crime trivialises rape which leads to it being dealt with outside courts. Consequently, the Arab block would not want rape to be addressed by an international court which would give the issue a bigger stage. The finding that national understandings of rape as an honour crime shaped the ICC negotiations through the Arab block's proposal confirms Hypothesis 5 expecting to find that rape was interpreted as an honour crime in the ICC negotiations.

Regarding the crime of sexual slavery, Chapter 9 found that the accepted language of a marriage offer, understandings of payments of dowry and maintenance, irregular and temporary marriages, and again the ideal of obedient wives are rights, duties and obligations related to marriage that can be interpreted to be an exercise of powers attaching to the right of ownership and therefore to amount to sexual slavery. To protect these marriage rights, duties and obligations, the Arab block might have wished to disconnect them from the crime of sexual slavery.

While the accepted language of a marriage offer, understandings of payments of dowry and maintenance, irregular and temporary marriages and the ideal of obedient wives bear resemblance to situations of sexual slavery and forced marriage in times of armed conflict and therefore could explain the Arab block's wish to disconnect them, other religious principles, socio-cultural norms and national laws can be interpreted to support the criminalisation of forced marriage in times of armed conflict. National marriage laws stress that the woman's consent to marriage is necessary for the marriage to be valid. An even stronger case can be made based on Articles 411 and 412 of the Libyan Penal Code and Article 296 of the Omani Penal Code. They cover abduction for the purpose of

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<sup>1427</sup> Research Question 2 reads: What influenced the driving actors?

<sup>1428</sup> Research Question 3 reads: What was the driving actors' understanding of war rape and forced marriage?

marriage and sexual exploitation and bringing, exposing or accepting a person for the purpose of sexual exploitation respectively.

In addition to exploring which religious principles, socio-cultural norms and national laws the Arab block might have wanted to protect, Chapter 9 also considered the Arab block's fear of social engineering. It became apparent that externally imposed legal reform processes such as those triggered by the national implementation of the Rome Statute might have been understood as attempts of social engineering. As this can have an impact on international treaty-making negotiations, it needs to be considered by participating delegations in developing their interests and actions so as not to disproportionately weaken, or jeopardise the conclusion of, a treaty.

Confirming Hypothesis 2,<sup>1429</sup> the Arab block's proposal to exclude marital sexual relations from the crime of rape and marriage rights, duties and obligations from sexual slavery makes it very clear that in the states constituting the Arab block, men hold a power position over women. This is supported by the husband's more extensive rights regarding his marital sexual enjoyment. The husband's more extensive rights in the context of marriage are linked to the religious principle that a wife has to be obedient and sexually available to her husband. The ideal of obedient wives raises questions of their autonomy and invokes notions of ownership. The accepted language of a marriage offer, including terms such as 'gifting', 'selling' and 'surrendering ownership', has the same effect. The payment of dowry can be interpreted as payment in exchange for the wife's vulva. Following on from this, the payment of maintenance secures the husband's exclusive access. The payment of maintenance can also be understood as an exchange or compensation for the husband's right to confine his wife to the house for his sexual gratification. In irregular and temporary marriages, the wife has the right to the payments of dower, but not of maintenance. Therefore, even though the husband owns her vulva, he has no right to exclusive use. Especially in relation to temporary marriages, it can be questioned whether the payment of dower is more of a purchase price, rather than a gift made by a groom to his bride. Also, it could be argued that, without protective rights, the wife is in a vulnerable position that is easily exploited by her husband. The partial

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<sup>1429</sup> Hypothesis 2 reads: States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage.

understanding of rape as an honour crime also indicates a view of women as men's property.

Patriarchal values, norms and rules would become contested if men could not freely decide on their marital relations. Therefore, patriarchal values, norms and rules would become contested if marital rape would be criminalised under International Law and if certain marriage rights, duties and obligations would amount to sexual slavery. Consequently, the wish to maintain existing power structures could have been the fundamental reason for the Arab block to dissent developments in national as well as international law in regard to sexualised crimes. This confirms Hypothesis 2 that states with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed progressive developments in International Criminal Law regarding sexualised and gender-based crimes.

## 10 Conclusion

### *10.1 Introduction*

The Conclusion summarises the nature and relevance of feminist and constructivist theories for this research project. It also recapitulates the main findings through these theoretical lenses. Here, the Conclusion draws together the discussion of war rape and forced marriage respectively, the critique of the ICC definitions of the two crimes, the analysis of the process of defining them, the theories behind their perpetration, and their legislative histories. Based on this, it is considered whether the ICC definitions of war rape and forced marriage could have been different. In addition, the Conclusion addresses the bigger question whether International Criminal Law is an appropriate framework to deal with war rape and forced marriage. Finally, the Conclusion outlines the thesis' potential contribution, problems experienced and areas of future research.

### *10.2 Theory*

This thesis analysed the ICC negotiations of the definitions of war rape and forced marriage in times of armed conflict from a feminist and constructivist point of view.<sup>1430</sup> The present researcher's understanding of the two theories as well as their relevance for this research project and how feminism and constructivism relate to each other are recapitulated below.

#### *10.2.1 The nature of feminism and constructivism and their relevance for this research project*

The present researcher's understanding of the research topic and its significance are informed by feminist ideas. Furthermore, the subject of the research project – the criminalisation of sexualised war violence against women – is a gender issue and, as will be explained in more detail below, feminist theories are useful to address it. For the purpose of this thesis, the aim of feminist theories and methods is understood to highlight

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<sup>1430</sup> For further information on feminist and constructivist theories and full references see Chapter 2.



sex/gender issues that are hidden by patriarchal structures. These patriarchal structures include legal rules, institutions and processes that construct realities that are different for women and men. Legal rules, institutions and processes are man-made and therefore reflect and prioritise men's social position, concerns and customs. Feminists highlight sex/gender issues by probing beneath surface appearances and questioning what has been taken for granted. Context and process sensitivity cause them to take a critical stance of absolutes and generalisations. Instead of scientific objectivity, feminism advocates subjectivity. This includes establishing the researcher as an individual with a specific identity and concrete interests that lead to certain emotions and behaviour. This implies that feminist methods recognise the role of feminist politics in feminist research. The political goal of gender equality, for example, is reflected in feminist research that emphasises non-hierarchical, reciprocal relationships in which every actor is considered knowledgeable. In addition, feminist research methods stress empathy and true dialogues. This objective, however, is not always upheld in relationships between feminists where arrogant competition and an insider/outsider distinction are noticeable. This might be the result of uncalled-for and unrealistically high expectations feminist research faces from the 'outside', compelling it to defend and aggrandise itself while at the same time making only tentative claims about research findings. This might lead to the assumption of a domination/subordination relationship that first takes the form of  $m > f$  and then considers other factors such as nationality, race, culture, class, age, education, profession and sexual orientation.

While studying sexualised war violence against women and the legal approach to it is of interest and relevance from a feminist point of view, constructivism allows for a more detailed analysis of the process of their criminalisation. In contrast to rational International Relations theories that conceive actors to have predetermined interests and to make calculated decisions based on cost-benefit considerations, constructivism claims that actors' identities and interests are socially constructed. They are shaped by normative structures, rather than by materialism. Actor's identities and interests shape their actions which in turn shape normative structures. Therefore, normative structures can change and constructivists seek to explain these changes. To explain changes in normative structures, systemic constructivists like Martha Finnemore focus on the international sphere. Finnemore claims that normative structures change due to interactions between actors in the international system as well as the impact of international normative structures. Unit-level constructivists like Peter Katzenstein, in contrast, stress the importance of domestic norms and their influence on actors' identities, interests and actions. While Finnemore

emphasises the role of outside actors such as NGOs in initiating change by teaching state actors what their interests should be, Katzenstein understands change to come from within state actors. A point of critique that can be raised against constructivist theories in general is that they reject the rationalist claim that actors are driven by pre-determined interests and cost-benefit calculations and yet they themselves establish the logics of consequences, arguing, practicality and purposive role playing as four possible explanations for normative change. However, they also consider questions of appropriateness and the effect of habit and emotions. Moreover, the constructivist priority of normative over material structures is challenged when considering the reality that states disregard normative structures when it is in their interest. A feminist critique of constructivist theories highlights that, contrary to reality, constructivists assume actors to be equal.

#### *10.2.2 The relationship between feminism and constructivism*

Comparing constructivism and feminism, both theories recognise that realities are socially constructed. Constructivism focuses on the fact that realities are constructed and the process of how a particular reality came about through the interaction of normative structures and actors. For feminism, in contrast, the outcome, the way realities are made to be, is more important than the fact that they are constructed. Feminism highlights that normative structures are not neutral but gendered and therefore influence actors in different ways. In addition, both, feminism and constructivism are interested in change. While constructivism focuses on the process of change, feminism focuses on substance. It adds politics to a constructivist analysis. By not taking a political position, however, constructivism establishes itself as a flexible theory that moves beyond specific sets of domination and subordination. The outcome of a constructivist analysis of the development of normative structures is more complex and less predictable than that of a feminist analysis that necessarily focuses on  $m/f$  and  $m > f$ .

### *10.3 How did the ICC definitions of war rape and forced marriage in times of armed conflict come about? A summary of the main findings*

This thesis grew out of a critique of the ICC definition of war rape and forced marriage. Therefore, it addressed the ongoing challenge of how to define the two crimes adequately, reflecting women's experiences and the nature of the crimes. The Elements of Crimes define the first element of rape as

“[t]he accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”<sup>1431</sup>

The awkward and regressive wording ‘invasion resulting in penetration’ is puzzling when taking into account that actors could have relied on the more progressive *Akayesu* precedent. Furthermore, actors in the ICC negotiations understood forced marriage as a form of sexual slavery and did not discuss it in depth. The perpetration of forced marriages in conflicts that were ongoing while the ICC instruments were negotiated makes this neglect problematic.

Against the background of this critique, this thesis analysed how the ICC definitions of war rape and forced marriage came about. Based on a combined feminist and constructivist approach it focused on the driving actors, the normative structures that influenced their identities, interests and actions, their understandings of the two crimes, and their methods of influencing the ICC negotiations. The following paragraphs draw together the main findings of this research project and further comment on the points of critique regarding the ICC definition of war rape and forced marriage. They also further comment on how feminist and constructivist theories relate to each other and what has been gained by approaching the ICC negotiations of war rape and forced marriage in this way.

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<sup>1431</sup> PrepCom2 ‘Discussion Paper Proposed by the Coordinator: Article 8, paragraph 2(b)(xxii)’ (n 1066) art 8(2)(b)(xxii)(1)(2); PrepCom2 ‘Proceedings of the Preparatory Commission at its Second Session’ (n 1066) art 8(2)(b)(xxii)(1)(2).

### *10.3.1 Who were the driving actors in the process of war defining rape and forced marriage?*

Both feminism and constructivism are interested in outside actors in the process of defining rape and forced marriage. A feminist analysis places a focus on women and men. A constructivist analysis, in contrast, focuses on state and non-state actors.

#### *10.3.1.1 The driving actors outside the ICC*

A combined approach shows that since the 18<sup>th</sup> century, a crucial development has taken place in international law-making regarding the identity of driving actors.<sup>1432</sup> In relation to the Treaty of Amity and Commerce, the Declaration of Brussels, the Oxford Manual, the Hague Convention, Protocol I and II Additional to the Geneva Conventions, and the War Crimes Commission established after the First World War, it was largely male statesmen who took measures concerning sexualised war violence. However, they actually took action only in a few cases like the von Hagenbach trial and the deliberations of Napoleon's fate after his defeat in the Battle of Waterloo. After the Second World War, this climate of state-centeredness and male exclusivity began to change. Women and NGOs participated in the drafting process of the Geneva Conventions. While male international observers testified on behalf of female survivors of sexualised war violence before the IMTFE, female survivors themselves told their stories to the international military tribunal in Nuremberg. As shown in the *Akayesu* and *Foča* cases, the personal testimony of survivors of sexualised war violence is crucial for the ICTR and ICTY to reach convictions. Today, women like Judge Navanethem Pillay of South Africa and Judge Florence Ndepele Mwachande Mumba of Zambia, Prosecutor Louise Arbour of Canada and Gender Advisor Patricia Viseur Sellers of the US/Belgium hold influential positions in both tribunals as well as in the SCSL. International and local NGOs and women's activists actively influenced international law-making and the work of international legal institutions like the ICTY, ICTR and SCSL. The international Coalition for Women's Human Rights in Conflict Situations, expert witness Zainab Hawa Bangura of Sierra Leone, the Green/Copelon Group, Human Rights Watch, the International Centre for Transitional Justice, the International Abolitionist Federation, the International Council of

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<sup>1432</sup> For further information on the driving actors in the process of defining war rape and forced marriage outside the ICC as well as full references see Chapters 4 and 5.

Women, and No Peace Without Justice played a vital role in drafting provisions, supporting on-site investigations and writing *amicus* briefs, letters and petitions. Female members of staff and NGOs contributed towards the informed inclusion of sexualised crimes in the investigation, prosecution and trial phase as well as gender-sensitive policies and processes in international courts and tribunals.

#### *10.3.1.2 The driving actors in the ICC negotiations of war rape and forced marriage*

In the ICC negotiations of the crimes of war rape and forced marriage, states were – as expected – the main actors, but NGOs also played a crucial role.<sup>1433</sup> Confirming Hypothesis 1,<sup>1434</sup> the discussion was driven especially by the Women’s Caucus but also the ICRC as non-state actors. Vocal state actors were the Arab block, Colombia and the US.

Feminist theories support the Women’s Caucus’ motivation to become active in the ICC negotiations of war rape and forced marriage. The Caucus wanted to ensure that sexualised crimes were appropriately addressed and that women’s concerns were considered. Moreover, feminist theories are helpful in scrutinising the ICRC’s and Arab block’s motivations to become involved. By playing its role as the guardian and expert of International Humanitarian Law, the ICRC preserved male norms and rules. The Arab block did the same by engaging in the ICC negotiations of war rape and forced marriage to protect national norms and rules against international interference. Outside the explanatory scope of feminist theories but indicating that actors’ interests and actions were constructed by emerging normative structures, Colombia had an interest in shaping the definitions of crimes as it was aware that it might become the focus of ICC investigations. Similarly, the USA insisted on defining the crimes under the jurisdiction of the ICC as it was worried that the institution might prosecute its own nationals.

Giving a voice to those unheard and emphasising women’s empowerment through participation in political processes, a feminist analysis of the ICC negotiations raises the

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<sup>1433</sup> For further information on the main actors in the ICC negotiations of war rape and forced marriage and their motivations to become involved as well as full references see Chapters 6 and 7.

<sup>1434</sup> Hypothesis 1 states that NGOs in general and women’s organisations in particular played a role in the development of the ICC definitions of war rape and forced marriage.

question if survivors of sexualised war violence were involved. Refuting Hypothesis 4,<sup>1435</sup> the Women's Caucus included, and worked with, survivors of sexualised war violence who campaigned for women's rights. As members of the Caucus' delegation, survivors had direct input in its positions. Women and women's organisations in different countries were informed about positions the Women's Caucus thought about adopting and asked for their views. The Caucus would consider the feedback it received when drafting its final positions. Therefore, survivors directly and indirectly influenced and shaped the outcomes of the ICC negotiations. However, it has to be noted that overall the participation of survivors was an exception.<sup>1436</sup>

#### *10.3.1.3 Will women and NGOs change the word?*

A feminist and constructivist analysis of the main actors in the ICC negotiations and legislative histories of war rape and forced marriage places great hopes for progress in International Law in the participation of women and NGOs respectively. While this thesis highlighted their successes, it also demonstrated that women and NGOs in influential positions do not necessarily and automatically advance the law.<sup>1437</sup>

The female members of the prosecution staff of the IMTFE do not appear to have pushed for a more appropriate gender policy of the tribunal which, for example, might have prevented male observers from testifying in the place of female survivors of sexualised war violence. Comparably, the women involved in the drafting process of the Geneva Conventions did not contribute to the discussion of Article 27 of the fourth Geneva Convention. It was outside actors – the International Council of Women and the International Abolitionist Federation – who proposed a provision specifically protecting women from war rape. While Judge Pillay successfully contributed to the establishment of a flexible and context-sensitive rape definition in the *Akayesu* case, Judge Mumba reintroduced a mechanical definition of rape in *Furundžija* as well as the notion of consent in the *Foča* case. In the ICC negotiations, the members of the Women's Caucus were

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<sup>1435</sup> Hypothesis 4 reads: Survivors of war rape and forced marriage and actors from the global South were not involved.

<sup>1436</sup> For further information on the participation of survivors of sexualised war violence in the ICC negotiations and full references see Chapter 6.

<sup>1437</sup> For further information on the participation of women and NGOs in international law-making and legal processes as well as full references see Chapters 2 and 4-7.

largely successful in advocating a progressive understanding of sexualised crimes. However, they experienced opposition from women based on religious grounds. Other women were perceived as corrupting the debate about gender issues and sexualised violence by continuously advancing strong opinions, for example about the relationship between sexualised violence and pornography.

Like women's advocacy, the generally high degree of activism of local and international NGOs in international trials and law-making also leads to mixed results. The Human Rights community active in Sierra Leone proposed to establish the Special Court alongside a TRC and to give the court jurisdiction over crimes committed in the conflict by all groups involved. This was received favourably by the United Nations Secretary-General. However, the Human Rights community's additional call for a purely international institution was rejected. Women's organisations and activists involved in the establishment and work of the ICTY and ICTR succeeded in having war rape explicitly recognised in the statutes of both tribunals as crimes against humanity. However, this is not the case for the war crimes provision of the ICTY and the genocide provisions of both tribunals. War rape is also not explicitly recognised as a grave breach of the Geneva Conventions. Furthermore, war rape is still linked to notions of dignity. The informed definition of war rape proposed to the ICTY by the Green/Copelon Group was not adopted in its entirety. The Coalition for Women's Human Rights in Conflict Situations actively influenced the *Akayesu* case. However, it was internal developments of spontaneous witness testimonies rather than pressure from outside that changed the course of the case. While NGOs were accepted and respected as strategic partners of states in the ICC negotiations and exercised considerable influence in the discussions of war rape and forced marriage, eventually, states had the whip hand. Relationships between NGOs and state delegations were generally constructive until NGOs disagreed with states' positions. In such cases, cooperation lessened. State actors, for example, insisted on the inclusion of the term 'penetration' and a reference to body parts in the ICC rape definition despite the Women's Caucus' advocacy to the contrary. As the expression 'invasion resulting in penetration' shows, the Caucus' call not to construct a rape definition with cumbersome and irritatingly specific wording also was not followed. In addition, the Women's Caucus' suggestion to include the words "with or without pecuniary benefit"<sup>1438</sup> in the definition of sexual slavery was not taken up.

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<sup>1438</sup> Women's Caucus for Gender Justice, 'Recommendations and Commentary to the Elements Annex and Rules of Procedure and Evidence' (n 838).

It becomes apparent that the success of women and NGOs in progressively developing International Law depends on the priorities, openness and receptiveness of members of the court or those in charge of establishing one. Women and NGOs still operate within male normative structures, circumscribing their opportunities and abilities to exercise influence. Dominating women, men led the negotiations of the Geneva Conventions and the IMTFE, and behaved in a patronising way towards female actors in the ICC negotiations. In addition to hampering the influence and success of women and women's groups this way, war rape was not seen as a serious issue and therefore, women's and/or NGOs' concerns in this regard were perceived to be trivial. The IMTFE applied a gendered framework to sexualised war violence by failing to establish a link between war rape and patriarchy, and to understand war rape as a deliberate act of violence against women and a means of waging war. In addition, war rape was marginalised in the ICTY and ICTR statutes by uniformly recognising it only as a crime against humanity and not consistently listing it as a war crime, an act of genocide and a grave breach of the Geneva Conventions, crimes which are considered to be more serious than crimes against humanity. In the IMTFE, the *ad hoc* tribunals and the ICC negotiations, precedents prevailed over adapting established rules to new contexts. This demonstrates that actors followed male reasoning processes. They were highly dependent on legal precedents that were analysed and applied using logic and abstraction. In the ICC negotiations, some actors considered attention to gender issues unnecessary. They relied on the progress made by the *ad hoc* tribunals and the positive effect of neutral rules. However, the ICC's and SCSL's understanding of acts of sexualised war violence against women such as forced marriage reflects and reinforces gender stereotypes of women as sexual beings and as housewives. This further limits the opportunities and abilities for women and women's groups to exercise influence. They are considered out of place in the public sphere and therefore not taken seriously.

### *10.3.2 What influenced the driving actors?*

A constructivist analysis of the ICC negotiations of the process of defining war rape and forced marriage warrants an examination of what influenced the driving actors to determine how they came to hold their views that shaped normative structures. The actors in the ICC negotiations of war rape and forced marriage were influenced by international,



national and personal values, norms and rules. This confirms both Martha Finnemore's and Peter Katzenstein's theories that international as well as national normative structures matter in international relations and law-making. Going beyond the focus of their claims, the thesis also recognised the relevance of personal values.<sup>1439</sup> While constructivists might be satisfied with the findings that international, national and personal normative structures mattered in the ICC negotiations of war rape and forced marriage, feminists turn towards those values, norms and rules to analyse their gendered implications.

#### *10.3.2.1 International normative structures*

Among the international normative structures that influenced the actors in negotiations of the definition of war rape and forced marriage were the 1907 Hague and 1949 Geneva conventions, Protocol I and II Additional to the Geneva Conventions, the 1926 Slavery Convention and the ICTR and ICTY instruments, judgments in the *Akayesu* and *Furundžija* cases and the *Foča* indictment. In addition, the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict as well as the Vienna and Beijing conferences and their outcomes were referred to.

The fourth Hague and Geneva conventions express a view of war rape as a violation of the honour of the family. The understanding of war rape as an honour crime emphasises the severity of the harm rape causes to survivors and communities. This makes it necessary to legally address rape. However, while the emphasis on the collective harm that rape causes reflects a purpose of war rape, it is detrimental to survivors. Their individual violation is obscured by the violation of the community. Women's (sexual) autonomy is denied by advancing a relational view of women.

In the period from the mid-1970s to the mid-1990s, international agreements and instruments such as Protocol I and II Additional to the Geneva Conventions and the Vienna and Beijing declarations and Platforms for Action framed war rape as an issue of protecting women and their fundamental rights. While this stresses that women are human

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<sup>1439</sup> For definitions of international, national and personal values, norms and rules see Chapter 2. For further information on the normative structures that influenced actors in the ICC negotiations of war rape and forced marriage and full references see Chapter 7.

beings and have human rights, it also implies that women are helpless and vulnerable and require special treatment. From the mid-1970s on, rape was also seen as an issue of discrimination. This resonates with the argument that unequal relationships between men and women are at the root of sexualised violence in peace and wartime.

In this atmosphere of strengthened women's rights advocacy regarding the recognition of war rape as a crime, the ICTY and ICTR were established. The statutes of both *ad hoc* tribunals explicitly include rape as a crime against humanity. In addition, rape is also explicitly mentioned as a war crime in the ICTR statute. In their jurisprudence, the tribunals recognised rape as a crime against humanity, a war crime, a genocidal act, torture and as a grave breach of the Geneva Conventions. This highlights that war rape was seen as a crime in and of itself as well as potentially constituting other crimes.

In the *Akayesu* case, the ICTR developed the first definition of war rape under International Criminal Law; a definition that uses the term 'invasion' and stresses the element of coercion. A rape definition using the term 'invasion' is gender-neutral, inclusive and culturally sensitive. It illustrates the survivor's point of view. A coercion-based rape definition emphasises the inequality between the victim and the perpetrator, the violence of the situation and the surrounding contexts. This indicates that a coercion-based rape definition is based on the value of equality and the resulting norm of non-discrimination.

In the *Furundžija* case the ICTY disregarded the *Akayesu* definition of war rape and developed a definition using the male term 'penetration'. Both, definitions of rape using the term 'penetration' and 'invasion' can be understood to be founded on the norm 'don't touch'. The term 'penetration', however, is understood to be less vague than the term 'invasion'. In spite of this, a rape definition using 'penetration' links rape to questions of honour and focuses on the physical aspect of rape. In line with this, the *Furundžija* definition specifies the physical aspects of rape, making it narrower than the *Akayesu* definition. Specifying body parts may be detrimental to survivors as testifying becomes more challenging because survivors have to give a detailed account of the physical aspects of the rape which may also infringe upon cultural sensitivities. This critique also applies to the ICC rape definition.

Paragraphs a and b of the definition of war rape developed in the *Foča* case built on the *Furundžija* definition. In Paragraph c, however, the ICTY returned to a consent-based rape definition. It viewed lack of consent and the knowledge thereof as an element of rape while also acknowledging that coercive circumstances could establish a lack of consent.

Contrary to a coercion-based understanding of the crime of rape, a rape definition centred on the concept of consent stresses that being raped deprives the victim of her sexual self-determination and freedom. Therefore it stresses the survivor's agency. The value of self-determination translates into the norm of non-interference in personal decisions. This indicates that a consent-based rape definition focuses on the psyche of the victim rather than on the acts of the perpetrator. In the *Foča* case, the ICTY also held that the physical and psychological detention of Bosnian Muslim women in various centres, private apartments and houses where they had to cook and clean for, and (sexually) serve, the Bosnian Serb soldiers living there fell under the gender-neutral crime against humanity of enslavement. The ICTY derived the definition of enslavement from Article 1(1) of the 1926 Slavery Convention.

Before moving on to national normative structures that influenced the ICC negotiations, it has to be stressed that while actors could draw on a relatively extensive legislative history in their discussions of a definition of war rape, forced marriage had only been defined in the Final Report of the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, Gay J McDougall. The Final Report is one of the first instances where forced marriage is established as an internationally recognised wrong that needs to be addressed because it violates the value of personal self-determination and the norm to be free to choose whom, when and how to marry. However, since the crime of forced marriage had not been well-established in the mid-1990s, it was not recognised as a crime in and of itself and as a form of sexual slavery instead. The categorisation of forced marriage as a form of sexual slavery, however, creates the false impression that forced marriage would predominantly be a sexual crime and consequently perpetuates stereotypes that women primarily experience war as victims of sexual violence. The categorisation of forced marriage as a form of sexual slavery does not capture the forced exclusivity and disregards the psychological force of acts of violence being disguised within the legitimate situation of marriage. It neglects that forced marriages cause different forms of suffering than sexual slavery and cause survivors to be discriminated against in unique ways. Contrary to these disadvantages of categorising forced marriage as a form of sexual slavery, it has to be acknowledged that the use of the label 'slavery' emphasises the seriousness of the crime of forced marriage. This critique also applies to the categorisation of forced marriage as a form of sexual slavery in the ICC negotiations.

### *10.3.2.2 National normative structures*

The relevance of national norms and rules in the ICC negotiations becomes apparent when considering that state delegations received instructions from their governments, including negotiation objectives that sometimes reflected national laws. Confirming Hypothesis 3,<sup>1440</sup> domestic definitions of rape, for example of the US and Colombia, prevented a more progressive wording that would not use the term ‘penetration’. The Colombian Penal Code of 2000 includes the crime of violent carnal access which includes rape. As rape is understood as penetration by the penis, the Colombian national definition of the crime ignores the use of other body parts and of objects. Similarly, the US Federal Bureau of Investigation’s definition of rape at the time referred to “[t]he carnal knowledge of a female”<sup>1441</sup> and defined rape in terms of coercion and lack of consent. The US definition focused on male to female rape, ignoring rapes of men and the use of objects. Article 44 of the Lieber Code includes a 19<sup>th</sup> century US American definition of rape that remains a point of reference in discussions on how to define the crime. Progressively, the Lieber Code directly prohibits war rape as an act of wanton violence that is punishable as a capital crime. It emphasises the physical harm rape causes by placing war rapes in context with other acts of physical violence. By placing rape in context with the destruction and unlawful taking of property, the Lieber Code also implies that women are men’s property. The Arab block’s proposals also highlight the relevance of national normative structures. With recourse to national laws, religious principles and cultural norms, the Arab block proposed changes to the definitions of rape and sexual slavery. Fundamental to the Arab block’s dissent towards developments in international law in regard to sexualised crimes was the wish to maintain existing patriarchal power structures. This confirms Hypotheses 2<sup>1442</sup> and 3<sup>1443</sup> as well as Peter Katzenstein’s theory that national norms and rules matter in international relations.

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<sup>1440</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

<sup>1441</sup> Federal Bureau of Investigation (n 20).

<sup>1442</sup> Hypothesis 2 reads: States with strong patriarchal structures, where religion plays a leading role in legal and social matters, opposed the development of progressive definitions of war rape and forced marriage.

<sup>1443</sup> Hypothesis 3 reads: Domestic norms explain the resistance towards more progressive definitions of war rape and forced marriage.

#### *10.3.2.3 Personal normative structures*

While constructivism does not place an emphasis on personal values, they are crucial to feminists. Personal values that played a role in the ICC negotiations had been formed through experiences of war and international justice work. The Women's Caucus' positions were informed by experiences of survivors of sexualised war violence with the ICTY and ICTR. Their participation in court proceedings indicates that survivors valued justice. The Caucus also based its identity, interests and actions on its members' experiences and expertise developed in previous caucuses formed at the Vienna, Cairo and Beijing conferences as well as in their work as Human Rights and women's rights scholars, lawyers and activists. Human Rights and women's rights work is often very personal for actors who are driven by the value of equality. Civil society actors who became members of state delegations and maintained, and argued for, their personal views are another example that demonstrates the impact of personal values on the ICC negotiations. Moreover, when governments' instructions to delegates were inadequate, delegates had to depend on their professional experience, daily progress evaluations and their perception of the international community's general interests. This indicates that delegates valued professionalism and communality. Delegates approached others to show them that certain positions, including those on sexualised violence, were in fact consistent with their governments' instructions. In addition, delegates shaped the content of their instructions through reports to their ministries.

#### *10.3.3 What was the driving actors' understanding of war rape and forced marriage?*

While the type of norms that influence actors is central to a constructivist examination of the ICC negotiations of war rape and forced marriage, it is not a major concern in a feminist analysis. A constructivist analysis, in contrast, is not concerned with actors' particular views on a topic but this is crucial in a feminists study. Therefore, in a purely constructivist research project, actors' understandings of war rape and forced marriage would not have been explored. From a feminist point of view, however, this is important because it informs actors' understandings of what problems exist and what

solutions may be needed, and therefore their stance in the debate. This is what feminist advocates take into consideration when devising their strategy.<sup>1444</sup>

#### *10.3.3.1 The driving actors' understandings of war rape*

Due to actors' different mandates, common sources of information were interpreted and used differently. Both the Women's Caucus and the ICRC were influenced by existing national and international rape laws. However, while the ICRC was bound by its role as guardian of International Humanitarian Law, the Caucus was guided by its mandate to advance women's rights. Therefore, the Women's Caucus was more at liberty to develop different foci and advance different suggestions. An example is the Women's Caucus' emphasis on the *Akayesu* case based on which it advocated a coercion-based rape definition using the term 'invasion'. The ICRC, in contrast, emphasised the *Furundžija* case and *Foča* indictment. As mentioned above, in both cases the ICTY arrived at a mechanical definition of rape using the term 'penetration'. The Women's Caucus and the ICRC agreed that rape should be recognised as a crime in its own right as well as constituting, for example, genocide and a grave breach of the Geneva Conventions.

Among the key actors in the ICC negotiations of the definition of rape, the Women's Caucus was the only one that held a more elaborate view. Considering its mandate, this was to be expected. In addition to advocating a coercion-based rape definition that used the term 'invasion', the Caucus stressed the importance of developing a broad, gender-neutral and perpetrator-centred understanding of rape as a crime in and of itself as well as potentially amounting to other crimes. This included a definition that does not rely on body parts and recognises situations that are directly and indirectly threatening to the victim. Refuting Hypothesis 6,<sup>1445</sup> the Women's Caucus also highlighted that rape is a form of gender violence and therefore a form of structural violence that continues from peace into wartime. This approach is in accord with the prohibition of gender-based discrimination.

Colombia, followed by the US, was a key actor that went through a considerable learning process. Based on its national rules, Colombia initially proposed a rape definition

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<sup>1444</sup> For further information on the driving actors' understanding of war rape and forced marriage and full references see Chapters 7-9.

<sup>1445</sup> Hypothesis 6 states that structural causes of the perpetration of war rape were not addressed.

using neither the term ‘invasion’ nor ‘penetration’ but ‘to have sexual access to the victim’. It understood this wording to be inclusive and to better protect the right of sexual freedom and freedom to exercise control over one’s body. A second proposal kept this wording but conversations with NGOs inspired the delegation to advance a different reasoning for it. They now took international legal developments and discussions, for example about the difference between rape and sexual violence, and evidential considerations into account. After further exchanges with NGOs led to a better understanding of the term ‘penetration’ as the use of any tool, the Colombian delegation proposed a rape definition using this term. Eventually, however, in a joint proposal of Spain and five South and Central American states including Colombia, the verb ‘to have access to’ was reintroduced.

Like Colombia, the US initially evoked national norms and rules in proposing a consent-based rape definition using the term ‘penetration’ before following the Women’s Caucus and stressing the coercive circumstances under which war rapes are committed. The US also agreed with the Caucus that rape should be recognised as an independent crime as well as potentially constituting other offences. It consecutively established a connection between rape and sodomy, enforced prostitution and sexual slavery respectively.

Like Colombia and the US, the Arab block also advanced an understanding of rape – or rather of what it is not – based on national norms and rules. The states constituting the Arab block understand marriage to legitimise sexual intercourse. Consequently, marital rape is legally impossible. This is supported by the ideal of obedient wives according to which wives have to be sexually submissive to their husbands. When an unmarried woman is raped, the understanding of rape as an honour crime (confirming Hypothesis 5<sup>1446</sup>) dictates that it should be dealt with in private rather than in court. Instead of a court trial, the rapist is encouraged to marry his victim to re-establish a woman’s honour and the honour of her family. The act of rape itself is understood in different ways by different states constituting the Arab block. Generally, however, it is mostly defined as non-consensual, sometimes as forced, sexual intercourse.

The above demonstrates that actors’ understandings of war rape were influenced by international, national and personal values, norms and rules. It indicated that the Women’s Caucus’ understanding of war rape was also shaped by the more theoretical view of war

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<sup>1446</sup> Hypothesis 5 states that war rape was interpreted as an honour crime.

rape as based on the discrimination and violence committed against women in everyday life. Moreover, the understanding of war rape as a weapon of war appears to have been implied in the ICC negotiations; otherwise it would not have been recognised as a war crime. Actors would not have recognised rape as a crime at all would they have understood it as an expression of natural male aggressiveness as this implies that rape is an unavoidable by-product of war and legal pursuit is futile. Would actors have taken into consideration that war rape can be understood as an expression of social interactions in the military, they might have argued more strongly for it being a form of structural violence and focused predominantly on the actions and context of the perpetrator. While actors in the ICC negotiations placed a focus on individuals involved in an act of rape as well as on the effect war rapes have on survivors' communities, advancing an understanding of war rape as a tool of propaganda would have also highlighted the effect of war rapes on societies as a whole.<sup>1447</sup>

#### *10.3.3.2 The driving actors' understandings of forced marriage*

Regarding forced marriage, only the Women's Caucus and the ICRC explicitly mentioned the crime in their discussions. Refuting Hypothesis 6,<sup>1448</sup> the Women's Caucus recognised forced marriage as a form of gender violence and therefore structural violence that has sexual and non-sexual aspects. This understanding is supported by the examples of Liberian and Ugandan women's experiences the Caucus referred to in its written recommendations and comments. Other examples like the situation of the Second World War comfort women, the rape camps that were established during the war in the 1990s in the former Yugoslavia and experiences of forced marriage of Burmese and Rwandan women, however, suggest an overemphasis on the sexual elements of forced marriage. This could explain why forced marriage was understood as a form of sexual slavery. The understanding of forced marriage as a form of sexual slavery is in line with the international community's view of forced marriage at the time of the ICC negotiations. The international community simply saw forced marriage as a sexual crime. Only its sexual elements that made it the crime of sexual slavery were important. Following the Women's

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<sup>1447</sup> For further information on the causes and meanings of war rape and full references see Chapter 5.

<sup>1448</sup> Hypothesis 6 states that structural causes of the perpetration of forced marriage were not addressed.



Caucus and/or the international community's view, the ICRC also saw forced marriage as a form of sexual slavery.

While the implicit categorisation of forced marriage as a form of sexual slavery conceals the link between the two crimes, the Arab block's understanding of sexual slavery – or of what it is not – draws attention to the connection by denying it. According to the Arab block, marital rights, duties and obligations do not constitute elements of sexual slavery. This, however, does not change the fact that some of them such as the accepted language of marriage offer and acceptance, understandings of dowry and maintenance, irregular and temporary marriages and the ideal of obedient wives could amount to an exercise of powers attaching to the right of ownership and cause a person to be subjected to sexual acts. Contrary to the Arab block, the Holy See became indirectly involved in the negotiations of forced marriage and sexual slavery through a proposal deleting any explicit reference to both crimes. Even though the Holy See did not refer to forced marriage, it might have had an interest in criminalising it as a marriage formed without mutual free consent violates Christian norms. Confirming Hypothesis 5,<sup>1449</sup> the Holy See may have interpreted forced marriage as an honour crime because it violates someone's self-determination and therefore someone's dignity.

The Arab block's general understanding of sexual slavery as an exercise of powers attaching to the right of ownership and causing a person to be subjected to sexual acts is in line with the understanding first advanced by the Women's Caucus and taken up by the ICRC. The actors established a link between sexual slavery and enslavement. While both are understood as an exercise of powers attaching to the right of ownership, the difference between the two is the sexual element that is only present in sexual slavery. The Women's Caucus highlighted direct and indirect threats through which women and men can be forced into slavery. A form of pecuniary exchange is possible but not necessary. Belgium and others as well as Costa Rica, Hungary and Switzerland convey a conflicting understanding of sexual slavery that is based on ICRC research. On the one hand, they also advanced the broad view that sexual slavery includes an exercise of powers attaching to the rights of ownership and recognised contemporary forms of slavery. On the other hand, however, they linked sexual slavery to traditional forms of chattel slavery.

While the Women's Caucus and the ICRC established a link between sexual slavery and enslavement, Canada and Colombia also understood sexual slavery to be

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<sup>1449</sup> Hypothesis 5 states that forced marriage was interpreted as an honour crime.

linked to trafficking in human beings as a person can be trafficked for the purpose of sexual slavery. Colombia also emphasised that the sexual element in a situation of sexual slavery has to be understood more widely than equating it with non-consensual sexual acts. It can also include sexual acts to which the victim consented due to coercion or resignation. Moreover, Colombia stressed that the crime of sexual slavery can be committed by more than one perpetrator, each with a different role that does not need to constitute a direct threat to the victim.

The US agreed with the Women's Caucus and Colombia that sexual slavery includes direct and indirect threats. However, it emphasised a pecuniary element in the exercise of powers attaching to the rights of ownership. The US further disagreed with Colombia and stressed the role of direct perpetrators. This narrow understanding of sexual slavery is contrary to the US' initially broad view of sexual slavery that focused more generally on an attack against a person and the consequential deprivation of liberty.

While the Women's Caucus and the ICRC explicitly mentioned forced marriage in the context of the ICC negotiations, it was not discussed in any detail. It was only in the early 2000s that the SCSL took up the issue and developed a legal definition of and approach to it, building on the *Foča* case as precedent. Would the actors in the ICC negotiations have been able to take the *Foča* judgment as well as the *AFRC*, *RUF* and *Taylor* cases into account, they would have been able to build their arguments on a more developed understanding of forced marriage as a situation where the status of marriage is conferred on someone by words or deeds. It could include conduct such as abduction, manipulation, enslavement, deprivation of liberty, sexualised violence, forced labour and corporal punishment. Nevertheless, some see it as a way to survive; to protect themselves from what they consider worse acts of violence and to gain socio-economic benefits. This is especially important because forced marriages destroy traditional interpersonal bonds between forced wives and their families and communities.<sup>1450</sup>

If the actors in the ICC negotiations also would have been able to take into account research on forced marriage published from the early 2000s on, they could have considered elaborations on the purpose of the perpetration of forced marriage. Forced marriage in times of armed conflict is a means to exercise control over fighters as well as women, to reward fighters and increase their status in the fighting group, to destroy traditional

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<sup>1450</sup> For further information regarding the causes and meanings of the perpetration of forced marriage as well as the post-ICC legislative history of forced marriage and full references see Chapter 5.

interpersonal bonds while creating new dependency structures within fighting groups, to achieve a masculine ideal, and to gain additional combatants. This indicates that forced marriage is a form of structural gender-based violence that is a continuation of peacetime norms and practices.

Despite the developing understanding of forced marriage, actors in the ICC negotiations might still have seen forced marriage as a form of sexual slavery. Forced marriage meets the factors that the *Foča* case introduced to be taken into consideration in determining whether or not a conduct amounts to an exercise of powers of ownership over a person. The SCSL furthermore determined that labelling a woman a fighter's wife, forcing her into an exclusive marital relationship, depriving her of her liberty, and controlling her sexuality, movements and labour amounts to sexual slavery.

However, actors in the ICC negotiations might also have understood forced marriage as an inhumane act because it does not easily fit the category of sexual slavery. Sexual slavery does not necessarily include forcing someone into marriage and to perform conjugal tasks that include sexual as well as non-sexual duties. In contrast to forced marriage, sexual slavery does not necessarily demand an exclusive relationship between two people. Forced marriage causes distinctive harm to forced wives and results in unique stigmatisation. Actors in the ICC negotiations might have advocated an understanding of forced marriage as an inhumane act as this makes it easier to recognise the crime of forced marriage as an interrelated, whole conduct that causes distinctive harm. It enables courts to fully address the crime and its consequences. However, categorising forced marriage as an inhumane act arguably conceals the seriousness of the crime

Actors in the ICC negotiations also might have questioned whether 'forced marriage' is the best way to refer to the conduct, or if 'conjugal slavery' might be a more appropriate term to use. The advantage of explicitly naming forced marriage is that it legitimises women's experiences during and after armed conflicts as they understand them. The disadvantage is that one could argue that the term 'forced marriage' hides the degree of coercion and exploitation that is exercised in a forced marriage. The term 'conjugal slavery' highlights that no actual marriage takes place between the spouses as well as the seriousness of the crime. However, it also carries the negative implications of the label 'slavery' discussed above.

#### *10.3.4 How did the driving actors influence the ICC negotiations of war rape and forced marriage?*

Constructivists argue that one way actors shape normative structures like the Rome Statute is by teaching other actors what their interests and consequently their actions should be, influencing their identity.<sup>1451</sup> In the ICC negotiations of the definition of war rape and forced marriage, actors taught other delegations by lobbying them. In their lobbying, NGOs addressed state delegations with which they expected to have a common ground. This highlights the importance of personal contacts that created shared understandings. States' delegates, in turn, evaluated NGOs' proposals in a similar way, based on the compatibility with their governments' positions. To influence other delegations as well as the ICC negotiations as a whole, networking and working in coalitions and caucuses was important. It facilitated cooperation, cohesion and the development of common strategies to reach common goals in the face of actors' diversity, and the wide range of activities undertaken and goals aspired to reach. NGOs taught other actors by continuously raising their awareness about issues for example through news conferences and parallel activities. NGOs also provided guidance for state and non-state actors, amongst others by distributing information such as expert documents. This was facilitated, for example, by holding regular meetings and briefings. In this way, NGOs provided the context for decisions that were to be made by states. The growing professionalism of NGOs, as states perceived it, enabled NGOs to shape state actors' identities and actions. Based on the ICRC's research, for example, Belgium, Colombia, Costa Rica, Finland, Hungary, Korea, South Africa and Switzerland proposed definitions of rape using the term 'penetration'. In addition to the ICRC, the Women's Caucus as a non-state and therefore outside actor in international law-making also succeeded in teaching its views on rape as a form of structural violence rather than as an honour crime to the US delegation. The US also followed the Caucus' advocacy in focusing on the perpetrator instead of the victim. In addition, state delegations followed the ICRC's and especially the Women's Caucus' advocacy and included various sexualised crimes in the Rome Statute as separate offenses as well as constituting other crimes if the relevant qualifications are met. With regard to the crime of rape, the Women's Caucus was

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<sup>1451</sup> For further information on the constructivist claim that NGOs are active teachers of states see Chapter 2. For further information on how the driving actors influenced the ICC negotiations of war rape and forced marriage and full references see Chapter 6.

successful in inspiring Costa Rica to develop a definition using the term ‘invasion’ instead of ‘penetration’.

In general, the analysis of the negotiations of the definitions of rape and forced marriage suggests that the Women’s Caucus was more successful in teaching its views on rape than its views on forced marriage to states. The Women’s Caucus’ ability to teach its views on forced marriage to states might have been limited by the fact that, at the time of the ICC negotiations, most actors did not see forced marriage as a serious issue that needed to be addressed legally. No precedents existed. Little research had been carried out. This again indicates the prevalence of male legal structures that see sexualised violence crimes committed against women from a male point of view and approach it using male legal reasoning that emphasises the important role of normative structures in shaping actors’ interests.

In addition to teaching other actors what their interests and subsequent actions should be, actors also influenced other actors in the ICC negotiations by facilitating their participation and giving a voice to those unheard. Actors financially supported small state delegations and made members of NGOs civil society members of a state delegation. Especially NGOs also engaged in capacity building and provided orientation and information such as progress reports to other actors.

Actors also influenced the ICC negotiations more directly by carrying out drafting work and submitting proposals. In addition to exercising this very direct influence, actors influenced the negotiations in more indirect ways through monitoring. NGOs also provided a platform for discussion and exchange. They facilitated compromises by mediating between different actors. In general, the high visibility of NGOs during the ICC negotiations was central to their ability to influence the definitions of war rape and forced marriage. They were active at international, regional, national and local level at all stages of the negotiation process.

#### *10.3.5 Preliminary conclusions*

Summarising the main findings through the lens of feminist and constructivist theories, a combined approach creates the opportunity to focus on women and NGOs –

including survivors – as (outside) actors in the ICC negotiations. It demonstrated that both played a role and highlights that neither women nor NGOs alone will change the world. The success of both depends on the attitudes and openness of other actors towards them, the flexibility of (normative) structures, their resources and professionalism. Furthermore, a combined approach allows for an analysis of the type of normative structures that influenced actors in the ICC negotiations as well as to critique their substance. It demonstrated that international, national and personal values, norms and rules influenced actors in the negotiations of war rape and forced marriage. It also highlights a non-linear development from male towards more progressive understandings of war rape and forced marriage. The focus of feminist research on the substance of (normative) structures made an analysis of actors' understandings of war rape and forced marriage necessary. It highlighted a diverse understanding of war rape as a coerced or non-consensual act of invasion or penetration. Rape was recognised as an honour crime by some and as a form of structural violence by others. Generally, rape was understood to include a variety of sexual acts that can be carried out by and against men and women. While understandings of war rape differed amongst actors in the ICC negotiations, unanimity prevailed regarding forced marriage. It was understood as a form of gender violence committed by men against women that includes sexual and non-sexual elements and is comparable to sexual slavery. Like rape, forced marriage was recognised as an honour crime by some and as a form of structural violence by others. Generally it can be confirmed that NGOs advanced progressive understandings of war rape and forced marriage while states with strong patriarchal structures where religion plays a leading role in legal and social matters opposed them. Their opposition was informed by national norms and rules. The constructivist interest in how actors came to hold their views that influenced normative structures necessitated an analysis of the way actors influenced the ICC negotiations. This thesis showed that actors influence normative structures by teaching other actors what their interests and consequent actions should be. Actors taught other actors through lobbying, coalition building, awareness raising and providing guidance. They also influenced other actors by facilitating participation, capacity building, and providing orientation and progress reports. Actors influenced normative structures more directly through their drafting work and more indirectly through monitoring the negotiations, and facilitating exchange and compromises.

#### *10.4 Could the definitions have been different?*

Based on the research findings, it can be concluded that the final ICC definitions of war rape and forced marriage were inevitable. Considering the actors involved, incompatible mandates prevented the ICC definitions of war rape and forced marriage from being different. Different mandates pulled actors in opposite directions – advancing the position of women versus maintaining male privileges, preserving international normative structures versus preserving national normative structures – which made compromises necessary in light of the required unanimity. The carefully negotiated compromise was often the only possible one.

This was the case regarding the ICC rape definition. Based on international norms and rules, a majority of delegations supported a definition using the broad and gender-neutral term ‘invasion’. A minority of delegations, however, stressed that most national definitions use the concept of penetration which was perceived to be more narrow but less vague than that of invasion. Mediating between the two sides, the Women’s Caucus and Costa Rica developed a definition using both terms. Their proposal went beyond national rape definitions like that of the US and Colombia and combined the *Akayesu* and *Furundžija* ones. This brief outline demonstrates that the wording of the ICC definition of rape is the smallest common denominator found between actors who sought to define rape as an act of invasion or penetration. The need for unanimity can also explain the categorisation of forced marriage as a form of sexual slavery. The consensus in the international community was that forced marriage was a form of sexual slavery, leaving no space for dissenting voices and consequently no space to develop a more progressive definition. This understanding was supported by the Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict.

In addition to taking into account the actors themselves, the normative structures that influenced them, and how they understood war rape and forced marriage, the methods actors used to influence the ICC negotiations made a different outcome unlikely. While consensus was furthered by the work in coalitions and caucuses, they silenced conservative but also progressive minorities. While non-state actors taught state actors what their interests and actions should be, they were unsuccessful when an issue was not already well-established. When NGOs pushed for progress, they were occasionally stopped by states with different interests.

The above discussion demonstrates that the actors' incompatible mandates made different outcomes of the ICC negotiations in regard to the definition of war rape and forced marriage unlikely. In addition, divergent precedents between national and international law as well as within international law led to conflicting understandings of the crime of rape which made any definition but the carefully negotiated compromise unlikely. In the case of forced marriage, insufficient precedents led to unchallenged unanimous understandings of the crime as a form of sexual slavery. Regarding the methods actors used to influence the ICC negotiations of war rape and forced marriage, differences in standing between state and non-state actors, the work in coalitions and the importance of a sound basis for advocacy made different outcomes unlikely.

Comparing the criminalisation of war rape and forced marriage under the ICC instruments demonstrates that the difference in the actors' approach to them – clearly defining rape as a crime in and of itself as well as constituting other crimes and categorising forced marriage as form of sexual slavery without discussing the conduct any further – was not due to the actors involved in the discussions of both crimes. Neither can the different approach be attributed to the methods actors used to influence the ICC negotiations of war rape and forced marriage. Both the actors involved and their methods were largely the same. Different approaches to the criminalisation of war rape and forced marriage also cannot be explained by the type of normative structures that influenced actors' understandings of the crimes. Actors' understandings of war rape and forced marriage were influenced by relevant international, national and personal values, norms and rules.

Instead, it appears that the different approach actors took to the criminalisation of war rape and forced marriage was influenced by the unequal standing of the two crimes in International Law and in the consciousness of the international community at the time of the ICC negotiations. The crime of rape was much better established than forced marriage in times of armed conflict. War rape had already been recognised as a serious issue. Research had been carried out about its causes, meanings and consequences and precedents existed on how to address and define rape legally. This influenced understandings of actors in the ICC negotiations of war rape as a crime that can be perpetrated by and against men and women, and causes them physical and psychological harm. Actors recognised the coercive context in which war rape takes place and its limiting impact on the possibility to



give free consent while also stressing the survivor's agency. War rape in itself was understood as a war crime and a crime against humanity as well as potentially amounting to other crimes such as torture and genocide. Differences in actors' understanding of war rape lay in the detail. However, it has to be stressed that before international tribunals established war rape as a crime in its own right, it was first categorised as a violation of the honour and rights of the family and then it was more broadly and adequately viewed as a breach of a person's fundamental rights. Once precedents were established, discussions of war rape were facilitated. Consequently, it can be argued that forced marriage – a conduct that had not been widely researched, discussed and legally addressed when the ICC negotiations took place – had to be categorised as a form of sexual slavery first before it could be considered as another inhumane act and a crime in its own right. Categorising forced marriage as a form of sexual slavery established it as a serious issue that had to be addressed legally. It conveys an understanding of forced marriage as a state of possessing a woman that includes causing her to engage in sexual acts.

The paragraphs above highlight that the two-pronged approach of this thesis, looking at both war rape and forced marriage, allowed a more thorough and comparative analysis of the factors that influence the process of criminalising sexualised crimes committed in wartime and therefore provided a more balanced answer to the central research question. Generally, the comparison of the legislative histories of war rape and forced marriage indicates that a conduct has to be established as a serious problem first and then discussed in the context of existing crimes before it can be criminalised in its own right.

### *10.5 Is International Criminal Law an appropriate framework to deal with war rape and forced marriage?*

In addition to criticising the ICC definitions of war rape and forced marriage and scrutinising the way they came about, a more general question can be asked: Is International Criminal Law an appropriate framework to deal with these crimes?

As the analysis of the legislative histories of war rape and forced marriage demonstrated, International Criminal Law is a way to address the breaches of International Law perpetrated through war rape and forced marriage. However, feminist theories

highlight that International Criminal Law reduces complex social problems to individual crimes, simplistic assertions of (ir)responsibility and binaries of good/bad, innocent/guilt and not-criminal/criminal. Moreover, the international legal system is a male structure that subordinates, stereotypes, controls and excludes women. International courts and tribunals silence survivors through rigid courtroom procedures that determine what counts as knowledge and limit the range of truths which can be testified while at the same time disregarding conventions of social forgetting. They also neglect material understandings of justice. In addition to feelings of fear and shame as well as information deficits, this contributes to survivors' reluctance to participate in international court proceedings.<sup>1452</sup> These shortcomings of the international legal system raise doubt as to whether International Criminal Law is an appropriate way to deal with war rape and forced marriage. Gender- and context-sensitivity as well as maintaining a high level of information would be necessary to improve International Criminal Law as a means to achieve justice for survivors of sexualised crimes, to deter future crimes and to raise awareness about them.

In addition, to adequately address war rape and forced marriage, international courts and tribunals should consider the causes, meanings and purposes of the crimes. The ICTY, ICTR and SCSL recognised that war rape and forced marriage are grounded in patriarchy and that both can be attributed to peacetime gender norms and stereotypes. The perpetration of war rapes is linked to the gender stereotype of male aggressiveness as an exercise of power over vulnerable women. While this also applies to forced marriages, they place more emphasis on a man's role as husband and father who provides for and protects his family against outsiders, and a woman's role as wife, housewife and mother. In regard to both crimes, the ICTY, ICTR and SCSL recognised that men exercise control over someone including that person's sexuality. Based on this, it can be argued that war rape and forced marriage are a way to regulate gender relationships. In addition, the ICTY, ICTR and SCSL confirmed that war rape and forced marriage are weapons of war, aimed at demoralising, disabling and destroying the opponent. At the same time, forced marriages and resulting forced pregnancies are intended to create bonds within fighting groups. War rape also serves as a means of propaganda. Since international courts and tribunals took the nature of war rape and forced marriage into account in their deliberations and

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<sup>1452</sup> For further information and full references see Chapters 2, 4 and 5. See also Hannah Baumeister, 'Forced Wives as Victims and Perpetrators of War Violence in Transitional Justice Processes' (2013) 21 *eSharp* <[http://www.gla.ac.uk/media/media\\_307343\\_en.pdf](http://www.gla.ac.uk/media/media_307343_en.pdf)> accessed 07 May 2015.

categorisations of the crimes, it could be said that International Criminal Law is an adequate way of addressing war rape and forced marriage.

In addition to the causes, meanings and purposes of the crimes, international courts and tribunals should take into account that war rape and forced marriage have various serious long-term consequences for survivors as well as for their social environment. The ICTY, ICTR and SCSL recognised that war rape and forced marriage have physical and psychological consequences. While these are largely similar, the SCSL stressed that, contrary to war rape, the imposition of a conjugal relationship manipulates forced wives into loyalty towards their forced husbands. Furthermore, while war rapes can result in a feeling of insecurity, being forced into an exclusive relationship and at the same time experiencing ongoing abuse at the hands of their forced husbands can make forced wives simultaneously loose and gain a feeling of security. The *ad hoc* tribunals as well as the SCSL also considered the social consequences of war rape and forced marriage in their processes and deliberations. Survivors of both crimes are stigmatised and often excluded from their families and communities. However, while survivors of war rape are held responsible for what happened to them, the SCSL called attention to the perception of ex-forced wives as rebel collaborators. Survivors of war rape and forced marriage are seen as tainted and therefore unmarriageable, a situation which is aggravated when they have children conceived in rape or forced marriage. However, unlike survivors of war rape, (ex-)forced wives have the possibility to stay with or return to their (ex-)forced husband in hope for socio-economic support. The stigmatisation of survivors and the exclusion of their children indicate that war rapes and forced marriages create mistrust and even destroy social networks, as recognised by the ICTY, ICTR and SCSL.<sup>1453</sup> Since the deliberations of international courts and tribunals also took some consequences of war rape and forced marriage into account when categorising the crimes and determining adequate processes to address them, it could be said that International Criminal Law is an appropriate way of addressing war rape and forced marriage.

If one concludes that the advantages of the international legal system outweigh its shortcomings and that it is an adequate way to address war rape and forced marriage, arguably war rape can be more easily addressed through International Criminal Law than forced marriage as it is understood to be a narrow act rather than a complex process. Rape is clearly framed as a coerced or non-consensual act that starts and ends with physical

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<sup>1453</sup> For further information on the consequences of war rape and forced marriage as well as full references see Chapters 4 and 5.

invasion/penetration. In contrast to rape, forced marriage is framed to include various steps. Someone is forced into marriage first and then this person is subjected to acts of sexual violence and forced labour. This indicates that the crime of forced marriage is perpetrated over a period of time during which its precise form can change. It might include rape from the beginning which can lead to forced pregnancy later. While forced wives are expected to cook and clean for their husband in times of low-intensity fighting, they might be forced to participate in direct combat when necessary. However, even though it might be more demanding for international courts and tribunals to address forced marriage, it is necessary for them to attend to it to reduce diffusion and advance clarity so that it can be addressed adequately.<sup>1454</sup>

#### *10.6 Potential contributions*

Firstly, contrary to the generally very positive view of the ICC rape definition, this thesis contributed a more critical interpretation.

Building on this and deepening the understanding of the ICC negotiations of war rape and forced marriage, this thesis narrowed two gaps in the existing literature on the process of defining war rape and forced marriage in the ICC negotiations. While the process of including rape in the Rome Statute and the final definition of the crime are well-researched, the process of defining rape itself, which took place after the Rome Conference in the PrepCom2, is seldom analysed. This thesis contributed a detailed analysis of the record of the making of the ICC from the 1994 ILC draft statute to the adoption of the Elements of Crimes in 2000. A focus was placed on the PrepCom2 negotiations as they dealt with the definition of crimes including rape rather than their categorisation discussed in the PrepCom and at Rome. In addition to describing what happened, this thesis contributed an analysis of key actors and their motivations and influences. This way, developments in states' positions on war rape could be traced, potentially indicating broader shifts in attitudes towards sexualised (war) violence against women. Identifying who pursued which interests can also facilitate effective coalition-building. An understanding of how actors came to hold certain views is crucial as a starting-point for effective engagement and advocacy to influence their positions in the future.

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<sup>1454</sup> For further discussion of war rape and forced marriage as acts or processes see Chapters 4 and 5.

The second gap this thesis addressed is the neglect of forced marriage in the context of the ICC negotiations. While previous research mentioned forced marriage in relation to the definition process of the crime of sexual slavery, this thesis contributed an analysis of the reasons why forced marriage was understood as a form of sexual slavery, providing the background for an analysis of the SCSL's elaboration on forced marriage.

By addressing forced marriage, this thesis raised awareness of the crime and how it has been dealt with outside the framework of the SCSL. Awareness-raising gives a voice to (ex-)forced wives and educates people about their experiences. A greater awareness of forced marriage is needed to develop a better understanding of the crime and to increase advocacy. It is a first step to changing how people and institutions think about and address forced marriage. As part of this necessary awareness-raising, the thesis contributed towards the theorisation of forced marriage. It advanced a new explanation of the causes and meanings of forced marriage that is grounded in hegemonic masculinity theory.

The analysis of the process of defining war rape, a well-theorised and well-established crime, and forced marriage in times of armed conflict, which is still undergoing definition and theorisation, highlights relevant factors that need to be considered in the process of internationally criminalising yet unrecognised acts of sexualised war violence. First, a form of conduct has to be established as a serious problem. Then it can be internationally criminalised in its own right. Precedents facilitate further discussions. In regard to war rape and forced marriage, their legislative histories show that (women's) advocacy is crucial in developing a more progressive understanding of women's experiences with, and the nature of, sexualised crimes. However, the legislative histories also show that the process of arriving at a progressive definition is not linear and takes time.

While this thesis identified using the term 'penetration' and the reference to body parts as shortcomings of the ICC rape definition, the whole definition of forced marriage as a form of sexual slavery was seen as ill-conceived. Divergent opinions on the one hand, and non-existent precedents resulting in a lack of discussion on the other hand, were established as grounds for these misconstructions. Identifying these shortcomings and how they came about highlights that law-makers have to be aware that International Law is a male structure and consider the causes, meanings, purposes and consequences of crimes when attempting to construct more adequate definitions of sexualised crimes in the future. Therefore, analysing the process of defining war rape and forced marriage in the ICC negotiations cannot only help legislators to make more adequate laws but also survivors

since they eventually benefit from definitions that more adequately capture their experiences as well as the nature of a crime.

#### *10.7 Problems experienced and areas of future research*

One of the key sources of information for this thesis was the official record of the ICC negotiations. It includes official documents recording the negotiations, drafting and discussions. A comprehensive record was also understood to include academic research outputs, some of which were written by people who participated in the ICC negotiations. The challenge of working with these sources was that they mostly exclude important records of informal meetings and drafting work. Official documents focus on the contribution of states. They record outcomes but not what brought them about. Therefore, this thesis could not identify which individual actors within state and non-state delegations played a key role in the ICC negotiation of the definition of war rape and forced marriage and why. Even balancing the information constructed from the official record of the ICC negotiations with interviews with people who participated in the negotiations did not shed much light on questions of individual contributions. Too much time had passed since the negotiations took place. Memory had faded and personal records were passed on or destroyed. The official records of the ICC negotiations also include lists of delegates. However, those lists were not available for all meetings and focused on state actors, making it difficult to ascertain which NGOs participated.

The research indicated that the coalition approach taken in the ICC negotiations crossed traditional divides between actors in international treaty negotiations. At face value, it facilitated equality between the global North and South. When analysing the ICC negotiations, however, it became apparent that equality was superficial. Participation of actors from the global South, for example, was facilitated by Western states and NGOs by providing them with access to various necessary resources like financial support and information, potentially creating dependency structures. In addition, members of NGOs from the global North became members of Southern state delegations, influencing their identities, interests and actions. Civil society members of state delegations might also have contributed the necessary English language skills and experience in international law-making. NGOs are often perceived to diminish power distortions among actors. However, even though the CICC was global in its membership, it was led by Human Rights groups

with headquarters in the global North. Their experience and network strengthened their impact on the ICC negotiations, creating inequalities with less experienced and less well-connected organisations. Based on these comments, it could be argued that the ICC negotiations were dominated by the global North, highlighting the applicability of postcolonial approaches.<sup>1455</sup> Furthermore, the relevance of postcolonial theories becomes apparent when considering that the ICC negotiations were understood by some actors as an imposition of a legal reform process and an attempt at social engineering. The Arab block, for example, “feared that the law on crimes against humanity was too ambiguous and might be used by activist judges [...] as a tool of ‘social engineering’”.<sup>1456</sup> It was concerned that new laws might alter the distinct gender roles within the family structure that the states constituting the Arab block understand to be required by religious principles and cultural norms. Future research could approach the ICC negotiations explicitly within a postcolonial framework and contribute towards a thicker analysis of the actors involved, and the relevance and role of national normative structures.

Focusing on the process of defining war rape and forced marriage under the ICC raised the question whether it was more important to achieve a satisfactory overall outcome than to include certain wordings in the ICC instruments. Future research could explore more generally if what words are used in a definition of a crime is only interesting from an academic point of view but less so in practice. After all, in practice, it has to be kept in mind that meanings of terms may change from one language to the other and distinctions may exist in one but not the other.

As this thesis focused on how the ICC definitions of war rape and forced marriage came about, it did not focus on the impact of the definitions. On the face of it, both the definition of war rape and forced marriage serve survivors. The definition of war rape recognises various sexual acts and a range of coercive situations under which they could be perpetrated. However, it also refers to body parts which could make it more challenging for survivors to testify because they have to give a detailed account of the physical aspects of the rape. Including forced marriage in the ICC instruments as a form of sexual slavery

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<sup>1455</sup> Social Theory Re-Wired, ‘Critical Race and Postcolonial Theory’ (2011) <<http://routledgesoc.com/profile/critical-race-and-postcolonial-theory>> accessed 31 March 2016: Postcolonial theories focus on the socio-cultural, political and economic effects of colonialism. They argue that socio-cultural structures persistently reproduce racist oppression. Postcolonial theorists aim to understand how these oppressive structures are produced in everyday life and how they shape powerful countries’ views of others and themselves.

For further information on the dynamics of the ICC negotiation and full references see Chapter 6.

<sup>1456</sup> Robinson (n 1102) 65.

made it possible for survivors to bring a claim for the first time. Both definitions, however, have gendered effects. The use of the term ‘invasion’ makes the definition of war rape gender-neutral. At the same time, however, the use of the term ‘penetration’ makes it male. During the ICC negotiations of sexual slavery and, by extension, forced marriage, an underlying presumption existed that sexual slavery is perpetrated by men against women. This reinforced gender stereotypes of women as victims. In addition, the categorisation of forced marriage as a form of sexual slavery narrowly focuses on sexual crimes, neglecting other experiences of women in wartime. These comments indicate that what looks like progress at first sight may not be so progressive after all, and does not fully serve survivors and their experiences. Therefore, future research needs to explicitly address in detail whose interests the ICC definitions of war rape and forced marriage serve as well as their gendered effects.

In addition to the impact of the ICC definitions of war rape and forced marriage, this research did not address the court’s application of these definitions. Future research could analyse if, and to what extent, the ICC is guided by the definitions that were set out in the Elements of Crimes and how that impacts on the cases before it and the people involved.

The thesis analysed the SCSL’s approach to forced marriage and how it identified the nature of the conduct. This, however, took place after the ICC Elements of Crimes had been adopted. Therefore, the SCSL could not have influenced the ICC negotiations of forced marriage. Building on the findings of this thesis, future research could explore whether the ICC negotiations influenced the SCSL, its instruments and jurisprudence. The legislative history of the definition of war rape show that the ICC negotiations built on the experience of the *ad hoc* tribunals which were influenced by international agreements and documents of the mid-1970s to the mid-1990s which were set off against the IMT and IMTFE as well as international agreements of the early and mid-20<sup>th</sup> century and bilateral and multilateral conventions concluded in the 18<sup>th</sup>, 19<sup>th</sup> and early 20<sup>th</sup> century. From this it can be deduced that the SCSL might have drawn on previous discussions of forced marriage that happened in the context of the ICC negotiations. Exploring continuities and discontinuities, it would be interesting to analyse in detail which actors influenced the making of the SCSL, especially its statute, as well as its jurisprudence and the impact of the ICC negotiations on the SCSL’s statute and jurisprudence. In addition, the sources of information the SCSL drew on in its elaboration of forced marriage would offer a welcome addition to the theorisation of forced marriage in times of armed conflict.



In addition to the ICC's impact on the SCSL, its impact on domestic rape and marriage laws could be analysed. Where domestic laws changed, it could be explored if and how these laws are implemented. If domestic implementation is ineffective, it could be examined why, and what could be done to improve it. Where domestic laws have not changed, the reasons for this could be analysed.

Another opportunity for future research lies in a comparative study of the impact of treaty negotiations and the judicial process of courts and tribunals on definitions of sexualised crimes. It could be argued that treaty negotiations as a political process result more easily in watered-down definitions of sexualised crimes than when a court considers a definition in the context of a case. Definitions of crimes determined in court cases, however, are unpredictable, depending, for example, on the persons involved and the context in which the court considers a case. Therefore, it could be asked whether judicial processes or treaty negotiations hold more potential to move definitions of sexualised crimes forward. Should we have lower expectations on treaty negotiations?

In conclusion, by unravelling the process of how war rape and forced marriage were defined in the ICC instruments, this thesis demonstrated that non-state actors facilitated de-politicised discussions. Nevertheless, concerns regarding national sovereignty and the protection of national normative structures limited the potential of the ICC negotiations to develop progressive definitions of war rape and forced marriage that adequately reflect women's experiences as well as the nature of the crimes.

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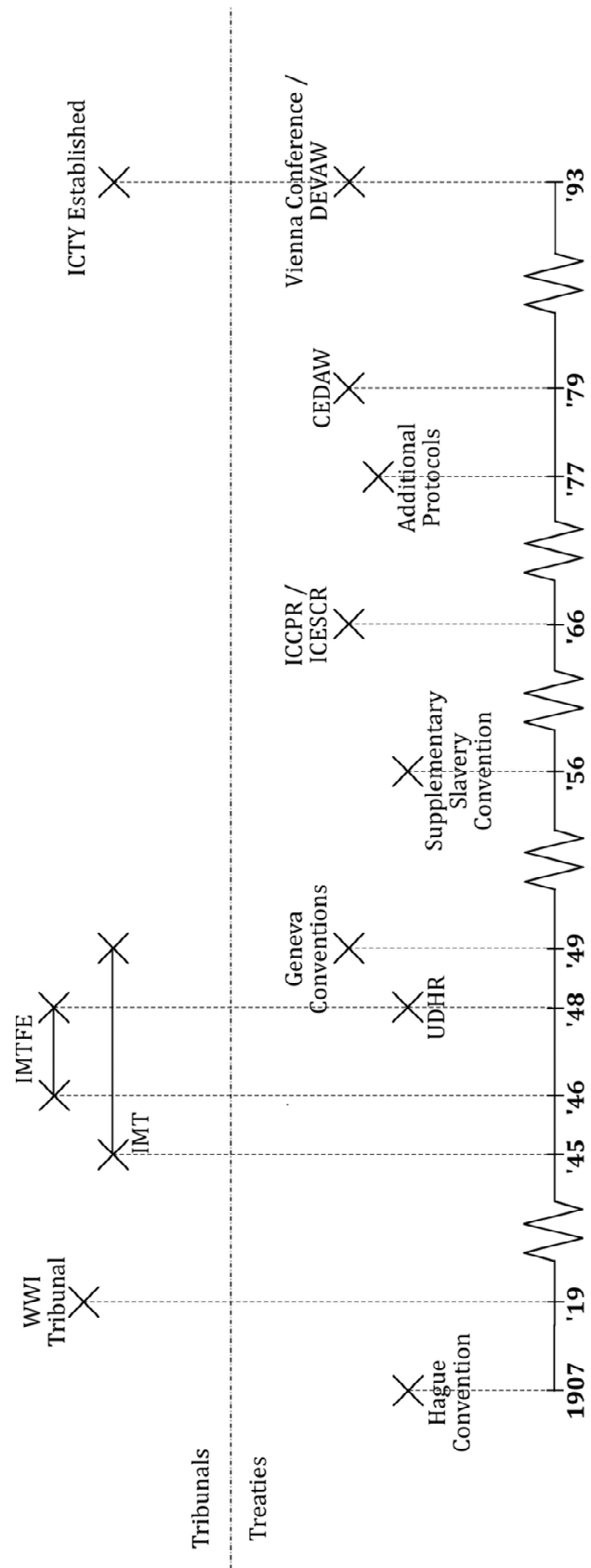
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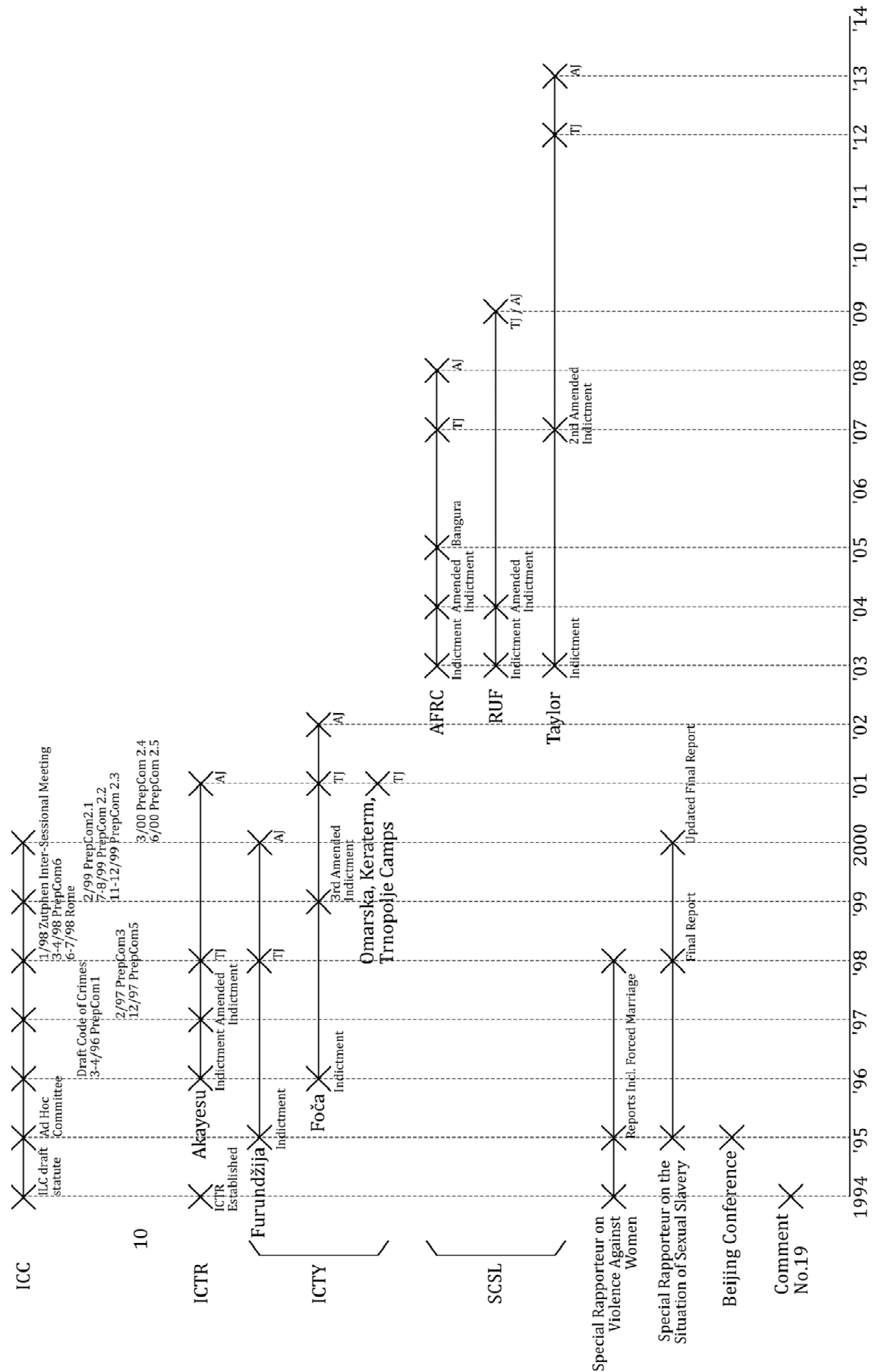
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**Annex 1 The legislative histories of war rape and forced marriage: A timeline**







## Annex 2 CICC's structure

